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No. -

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

GLOBE NEWSPAPER COMPANY,
PETITIONER,

v.

UNITED STATES OF AMERICA AND
THREE JUVENILES,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the public has a presumptive First Amendment right of access to juvenile delinquency proceedings charging an 18 year old and two 16 year olds with a series of hate crimes intended to rid a community of Black and Jewish citizens.

2. Whether the First Amendment requires that juvenile delinquency proceedings may be closed to the public only if the trial court makes specific findings demonstrating that, first, there is a substantial probability that the juvenile's interests in rehabilitation will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the interests in rehabilitation.

3. Whether the Federal Juvenile Delinquency Act, 18 U.S.C. §§5031-5042, supplants the public's common law right of access by establishing a presumptive rule of closure for proceedings conducted under the Act.

RULE 29.1 LISTING

Globe Newspaper Company is a wholly-owned subsidiary of the New York Times Company.

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ON WRIT OF CERTIORARI TO THE FIRST CIRCUIT COURT OF APPEALS

Globe Newspaper Company ("Globe") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (App., *infra*, 1-17) is reported at 61 F.3d 86 (1st Cir. 1995). The Court of Appeals' denial of Globe's Petition for Rehearing (App., *infra*, 18-19) is unreported. The opinion of the United States District Court for the District of Massachusetts denying Globe's access motion (App., *infra*, 20-34) is reported at 862 F.Supp. 651 (D. Mass. 1994). The District Court's opinion entering guilty findings against the defendants (App., *infra*, 35-58) is reported at 886 F.Supp. 934 (D. Mass. 1995).

JURISDICTION

The Court of Appeals entered its judgment on July 31, 1995. Globe's Petition for Rehearing was denied on August 25, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

During the latter half of 1993, a "skinhead" group known as the New Dawn Hammerskins ("NDH") was formed in Brockton, Massachusetts. The organization was founded on the belief that the Brockton area was overrun by Blacks and Jews and that violent tactics were needed to scare minorities into leaving the community. The group adopted a paramilitary hierarchy, with "chairmen" at the top and "shock troops" at the bottom. In the fall of 1993, the group engaged in a series of acts to implement its plan to rid the Brockton area of Jews and Blacks.

In September of 1993, NDH members, armed with baseball bats and a tree branch, stapled a confederate flag on a truck and drove to a local mall intent on "bashing" minorities. The group spotted two black girls, 12-14 years old, walking on a public street. When the driver of the truck, wearing a Nazi armband, drove toward the girls, one of his passengers yelled: "Get out of Brockton, you fucking niggers", then threw the stick at one of the girls, striking her in the leg before she and her companion ran away.

During another evening that same month, an NDH member slashed four tires on the car of a Brockton woman and carved the initials "ZOG", for "Zionist Occupied Government", into the paint of her car. The woman was a high school teacher who taught a course on the Holocaust. In October 1993, the group attacked the Temple Beth Emunah in Brockton, intending to force the temple congregants to move out of the area. A swastika was painted on the temple, along with a tribute to a skinhead rock singer. "The next morning, members of the temple, including fifth and sixth grade students, saw the Nazi graffiti and were upset by it." App. at 41. That same month, the group desecrated a synagogue in Randolph, Massachusetts, spray painting on the walls a white power fist, ZOG and "Toten Ganz Juden", German for "all Jews must die". "Two elderly brothers, who were Holocaust survivors, saw the symbols the next day and wept." *Id.*

At another point, the group collected baseball bats, bricks and spray paint for the purpose of "bashing" Blacks by kicking them with their army boots, beating them, and spray painting them white. Shortly after the plan was foiled, they were pulled over by the police and videotaped by a television camera crew. No arrests were made, but one NDH member (a respondent here) took the opportunity to express his white separatist views to the press.

In November of 1993, NDH members went to a local mall to harass Black patrons. While the group cheered, one member assaulted an African-American couple in a bookstore calling them "mud people," telling them to "[g]o back to Africa," and saying that he wished he had a gun and that they would "die in a race war." The Black couple complained to a store employee: "That's why we don't come to — that's why we don't like to come to this mall." App. at 43. Later, in the mall garage, the group harassed a mixed race couple, calling them "race traitors." *Id.*[1]

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[1] The foregoing factual findings are contained in the District Court's opinion in support of guilty findings entered against the defendants, reported at 886 F.Supp. 934 (D. Mass. 1995) (App., *infra*, 35-58).

On July 19, 1994, federal and state law enforcement officials held a joint press conference to announce that the acts summarized above were the subject of the first prosecution for federal hate crimes in Massachusetts. The charges were brought under the Federal Juvenile Delinquency Act, 18 U.S.C. §§5031-5042 (the "Act") (App., *infra*, 59-69). During the press conference, the government disclosed that it had filed an information charging three unnamed juveniles, aged 18, 16 and 16, with federal conspiracy offenses stemming from assaults and civil rights violations. According to the government, the defendants had taken an oath to arm and defend the white race, never to race mix, and to kill anyone who betrayed the group. The government also announced an indictment on similar charges against an adult alleged to be a co-founder of the NDH.

In the days following the government's press conference, the charges and subsequent arrests received considerable press coverage, including publication of the names of the defendants, an interview with one of the arrested juveniles, details of acts of the NDH, and a photograph of one of the juveniles charged.[2]

The defendants were arrested, arraigned and entered pleas of not guilty to the charges against them. Immediately prior to the arraignments, Globe moved to intervene in the proceedings for the purpose of gaining access to the arraignments and subsequent proceedings, as well as to any judicial documents filed in connection with the case. Globe's motion stated that it did not seek access to the juveniles' names. The District Court allowed Globe to intervene and granted it access to certain redacted documents, but denied public access to any of the judicial proceedings on the grounds that the Act mandated closure of all proceedings. App. at 26-30. The District Court alternatively held that, even if closure were dis-

[2] Globe was not one of the newspapers that published the juveniles' names. The defendants subsequently sought to hold four other local news organizations in contempt for publishing their names, a motion denied by the District Court.

cretionary, it would close all proceedings in the case. App. at 30-31.

Globe appealed the District Court's judgment. In the meantime, the case against the defendants proceeded to trial. Motions to suppress statements by the juveniles as involuntary were denied by the District Court. App. at 48-49. After a seven day bench trial, guilty findings were entered against each of the defendants on charges of conspiracy to intimidate Jewish and Black citizens. App. at 35-58.

On appeal, the United States Court of Appeals for the First Circuit reversed the District Court's holding that the Act mandated the closure of all juvenile delinquency proceedings. App. at 12. The Court of Appeals noted that, given this Court's decision in *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596 (1982), interpreting the Act as mandating the closure of all juvenile trials would raise "serious First Amendment concerns." App. at 8. *See also id.*, at 5, 12.

The Court of Appeals nonetheless held that the Act permissibly established a presumption in favor of closure applicable to all juvenile trials. App. at 13, 14 and 16 n.8. Under that rule of presumptive closure, the District Court's order was affirmed based upon the prosecution's and the defendants' desire to close the proceedings, the fact that only one of the three defendants had a prior criminal record, and the rehabilitative purpose of the Act. App. at 13-14. According to the Court of Appeals, the heinous nature of the juveniles' conduct also supported the closure order. App. at 14 n.7. Acknowledging that the prior wide-spread publicity concerning the juveniles' identities would have rendered redaction of their names from the proceedings "an exercise in futility," App. at 16, the Court of Appeals nevertheless held that the closure order was an effective means of preserving the defendants' confidentiality. App. at 14-15. The Court also held that the Act's presumptive rule of closure supplanted the public's common law right of access to judicial proceedings. App. at 16-17.

REASONS FOR GRANTING THE WRIT

This case presents the important question of whether the public has a First Amendment right to attend juvenile delinquency trials commensurate with its right to attend criminal trials. The Court of Appeals applied a rule of presumptive closure to juvenile delinquency cases, a rule that directly conflicts with the constitutional standard applicable to criminal trials, including those involving juvenile victims of sex offenses. *Globe*, 457 U.S. 596. The issue of whether the First Amendment affords a public right of access to juvenile delinquency trials has not been decided by this Court, and has divided lower courts. Because the issue turns in part on whether there is an historical tradition of public access to such proceedings, the case also presents an opportunity for this Court to address whether, given the fundamentally coercive nature of delinquency cases, the relevant historical inquiry is the practice during the Framers' time of public attendance at the trials of juveniles accused of breaking the law, or whether the more recent history of access to juvenile proceedings in this century is the controlling constitutional inquiry.

This case also raises the important issue of the proper constitutional standard to be applied in deciding whether to close a juvenile trial. In order to close a criminal trial, this Court has required findings that publicity will cause a substantial probability of prejudice to a compelling state interest that closure would prevent and that reasonable alternatives to closure will not adequately protect the interests at stake. The Court of Appeals, in contrast, found the First Amendment more accommodating to the well-being of a juvenile offender than to that of a juvenile victim. Under its more lenient rule of presumptive closure, extensive, lawful publicity concerning the juveniles' identities and their offenses was deemed irrelevant to a case-specific analysis of whether the closure order effectively served a compelling state interest in confidentiality. According to the Court of Appeals, it also was "com-

pletely misguided" to view the heinous nature of the defendants' conduct or the public interest in seeing justice done as supporting public access to the trial. To the contrary, public concern and outrage about the defendants' conduct was considered a reason to close the trial. The desires of the defense and prosecution for a private trial, the fact that only one of the three defendants had a prior criminal record, and the general rehabilitative purpose of the Act were held sufficient factors to justify closing the entire trial. Because of the importance of the standard of review applicable to the closure of juvenile trials, and the divided results reached by lower courts, certiorari review is warranted.

Finally, the Court of Appeals construed the Act as supplanting the common law of access to judicial proceedings by establishing a presumptive rule of closure. This interpretation of the Act conflicts in principle, if not directly, with the recent decision of the Third Circuit Court of Appeals in *United States* v. *A.D.*, 28 F.3d 1353 (3d Cir. 1994), a further reason for review by this Court.

I. WHETHER THE PUBLIC HAS A PRESUMPTIVE FIRST AMENDMENT RIGHT OF ACCESS TO JUVENILE DELINQUENCY PROCEEDINGS IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS DIVIDED LOWER COURTS AND SHOULD BE SETTLED BY THIS COURT.

On five separate occasions, this Court has held that the First Amendment provides the public with a presumptive right of access to attend and observe criminal justice proceedings in order for the public to inform itself about the functioning of its government and to enable meaningful public debate and reform through the operation of the Speech, Press and Petition Clauses. This presumptive First Amendment right of access has been extended to various stages of the criminal justice system, notwithstanding an array of substantial competing interests, including a defendant's constitutional right to a fair trial and a juvenile rape victim's privacy interests. *See Rich-*

mond Newspapers v. *Virginia*, 448 U.S. 555 (1980) (defendant's fourth trial for murder); *Globe*, 457 U.S. 596 (privacy interests of juvenile rape victim); *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501 (1984) (*"Press Enterprise I"*) (privacy interests of prospective jurors during *voir dire* in prosecution of interracial rape and murder of teen-age girl); *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1 (1986) *"(Press-Enterprise II")* (fair trial interests of defendant in preliminary criminal hearing before magistrate); *El Vocero de Puerto Rico* v. *Puerto Rico*, ____ U.S. ____, 113 S.Ct. 2004 (1993) (reputational and fair trial interests of criminal defendant in preliminary hearing).

This case presents the important question not yet decided by this Court of whether the First Amendment affords the public the same presumptive right of access to juvenile delinquency proceedings as to criminal trials or whether, as the Court of Appeals held, the Constitution permits a rule of presumptive closure in such cases. In a broader sense, the case also raises the question of the extent to which a legislative reform (here, the sometimes popular social theory that juveniles are best tried behind closed doors) may insulate itself from the type of constitutionally protected public scrutiny that might lead to its rejection at the ballot box. In this era of rising violent juvenile crime, the role the First Amendment plays in the public's ability to inform itself about the juvenile justice system is an issue of exceptional importance that ought to be decided by this Court.

In August of 1995, the Office of Juvenile Justice and Delinquency Prevention of the Department of Justice published a report on the United States juvenile justice system (the "DOJ Report").[3] The Report's findings included the following:

- "[T]he juvenile violent crime arrest rate soared between 1988 and 1992" (DOJ Report at 104);

[3] *See* Snyder, Howard N. & Sickmund, Melissa, *Juvenile Offenders and Victims: A National Report*, Office of Juvenile Justice and Delinquency Prevention (1995).

- "The increase in violent crime arrest rates is disproportionate for juveniles and young adults" (*id.* at 112);
- "[T]he juvenile arrest rate for weapons violations increased 75% between 1987 and 1992" (*id.* at 108);
- "Law enforcement agencies made nearly 2.3 million arrests of persons under age 18 in 1992" (*id.* at 100);
- "If trends continue as they have over the past 10 years, juvenile arrests for violent crime will double by the year 2010" (*id.* at 111).

For those who have been victimized by juvenile crime — like the minority community in Brockton — the DOJ Report merely confirms a well-known reality. The judicial proceedings convened in this case were a governmental response to public acts of racial and political terrorism. Quite understandably, and quite properly, the community and the local press took notice. The Article III judge who presided over the proceedings was charged with the duty of deciding whether federal prosecutors carried their burden of proving that the juveniles' conduct violated federal criminal laws. 18 U.S.C. §5031. Proof of the charges carried with it the threat of incarceration. That meant that the juveniles were entitled to a host of criminal procedure safeguards rendering the proceedings virtually indistinguishable from a criminal trial: proof beyond a reasonable doubt; the right to counsel; the privilege against self-incrimination; the right of confrontation and cross-examination; protection against Double Jeopardy; and the right to a speedy trial, among others. *In re Gault*, 387 U.S. 1, 31-57 (1967); *In re Winship*, 397 U.S. 358 (1970); *Breed* v. *Jones*, 421 U.S. 519, 531 (1975); 18 U.S.C. §§5032-5036.

The trial was a governmental proceeding of intense importance to the community, a subject of constitutionally protected public interest and debate. Did the evidence show beyond a reasonable doubt that the defendants in fact had assaulted young black women because of their race, or a high school teacher because she taught a course on the Holocaust,

or African-American patrons of a local mall, whose affront was to browse in a bookstore? Or were the defendants sanctioned not for their conduct but for their unpopular political views? Were the proceedings conducted fairly? How did the judge and prosecutor discharge their public duties? Did defense counsel furnish an adequate and competent defense? Did the District Court properly deny the defendants' motion to suppress their incriminating statements as involuntary? Was the disposition just? Did the proceedings deter others from engaging in such conduct? Or, as the Court of Appeals held, was the government entitled to tell its citizens that these are questions best left to government officials who can be trusted to strike the correct balance behind closed doors?

In the context of criminal trials where, as here, the accused's liberty is at stake, this Court unequivocally has held that the First Amendment's "core purpose of assuring freedom of communication on matters relating to the functioning of government" requires that trials be presumptively open to the public. *Richmond Newspapers*, 448 U.S. at 575. *See also id.* at 575 ("In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees."). Indeed, the First Amendment's protections for "the indispensable conditions of meaningful communications," *id.* at 588 (Brennan, J., concurring), are so strong that even when the well being of a juvenile rape victim is at stake, the trial must be presumptively open and may be closed to the public only if case-specific findings demonstrate that closure is necessary to serve a compelling governmental interest and that the closure order is narrowly tailored to serve that interest. *Globe*, 457 U.S. at 607.

In contrast, the Court of Appeals found the First Amendment more protective of juvenile offenders than juvenile victims. It recognized that because of this Court's holding in *Globe*, the District Court's interpretation of the Act as establishing a *mandatory* closure rule would raise "serious First Amendment concerns." App. at 8. *See also id.* at 5, 12. In

the Court of Appeals' view, however, those concerns evaporate if a mandatory closure rule is replaced by a rule of *presumptive* closure, a scheme where closure "is not an exception to some general rule of openness, but the norm." App. at 13. *See also* App. at 14, 16 n.8. According to the Court of Appeals, it was "highly dubious" to assume that First Amendment analysis is triggered by anything short of an absolute ban on public access to juvenile proceedings. App. at 8 n.4, 12 and 15. This cribbed view of the First Amendment as protecting the public's right to know only against an absolute rule of mandatory closure recalls Justice Jackson's description of an emasculated constitutional protection as a "teasing illusion like a munificent bequest in a pauper's will." *Edwards* v. *California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring). The issue is one of national significance, warranting review by this Court.

A. *The Court of Appeals decision conflicts with decisions of state courts of last resort.*

Whether the First Amendment provides the public with a right of access to juvenile delinquency trials and the constitutional standard for closing such proceedings are questions that have divided the lower courts. The First Circuit's rule of presumptive closure, for example, is in direct conflict with the Supreme Court of Tennessee's recent decision in *Tennessee* v. *James*, 902 S.W.2d 911 (Tenn. 1995). *James* held that the First Amendment required the burden of proof to be shouldered by the party seeking to close a juvenile hearing, and required that such closure orders be based on findings of particularized prejudice overriding the public interest in open proceedings, be no broader than necessary, and be entered only after consideration of reasonable alternatives to closure. 902 S.W.2d at 914. *See also Tennessee* v. *James*, 1995 Tenn. App. LEXIS 533 (Tenn. App. 1995) (noting that Supreme Court of Tennessee's decision in *James* was based solely on the First Amendment).

The Ohio Supreme Court applied still another constitutional standard in *In re T.R.*, 52 Ohio St.3d 6, 18-19, 556 N.E.2d 439, 451 (1990) (juvenile court proceedings may be closed if findings demonstrate that: "(1) there exists a reasonable and substantial basis for believing that public access could harm the child or endanger the fairness of the proceeding, and (2) the potential for harm outweighs the benefits of public access"). The Georgia Supreme Court has held that the First Amendment requires that any statutory presumption of closure for juvenile proceedings be rebuttable upon a showing that the juvenile's interest is not "overriding" or "compelling". *Florida Publishing Co.* v. *Morgan*, 253 Ga. 467, 473, 322 S.E.2d 233, 238 (1984). The Supreme Court of South Dakota has held that the public has a qualified, but not presumptive, First Amendment right of access to juvenile trials. *In re M.C.*, 527 N.W.2d 290 (S.D.1994). The Vermont and Rhode Island Supreme Courts each have held that there is absolutely no First Amendment right of access to juvenile proceedings. *In re J.S.*, 140 Vt. 458, 466, 438 A.3d 1125, 1128 (1981); *Edward A. Sherman Publishing Co.* v. *Goldberg*, 443 A.2d 1252, 1258 (R.I. 1982). *Cf. Brian W.* v. *Superior Court of Los Angeles County*, 20 Cal. 3d 618, 625-26, 574 P.2d 788, 792-93 (1978) (recognizing salutary function of press reports on juvenile proceedings); *Taylor* v. *State*, 438 N.E.2d 275 (Ind. 1982) (closure of juvenile proceeding implicates First Amendment interests); *R.L.R.* v. *State*, 487 P.2d 27, 38 (Alaska 1971) ("The reasons for the constitutional guarantees of public trial apply as much to juvenile delinquency proceedings as to adult criminal proceedings.").

One United States District Court has held that the First Amendment affords a qualified right of access for proceedings under the Act, *United States* v. *Nelson*, 22 Med. L. Rptr. 2320 (E.D.N.Y. 1994), and another has held that First Amendment interests support an order permitting public access under the Act. *United States* v. *Doe*, 22 Med. L. Rptr. 1693 (D. Wis. 1994).

The Court of Appeals' decision only deepened the divide

between lower courts that for years have considered these issues without reaching consensus. Because the public interest in examining the functioning of the juvenile justice system grows markedly with each passing year, this Court should provide the lower courts with a definitive resolution of this important constitutional issue.

B. *The Court of Appeals failed properly to apply the test for determining whether the First Amendment right of access applies to juvenile delinquency proceedings.*

Since its decision in *Richmond Newspapers*, this Court has firmly established a two-part test for determining whether the First Amendment provides the public with a right of access to any particular judicial proceeding. That test requires consideration of whether the proceeding at issue is the "type" or "kind" that has "historically been open to the press and general public" and whether public access "plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, 478 U.S. at 8; *Globe*, 457 U.S. at 605-06. The Court of Appeals failed to cite this governing standard in holding that the First Amendment permitted a rule of presumptive closure for juvenile delinquency proceedings. Applied objectively, the historical inquiry reveals that at the time the Constitution was adopted, juveniles charged with violations of law were tried in public and that the closure of modern juvenile delinquency proceedings is more a matter of rhetoric than reality.

1. *Juveniles charged with violations of law historically were tried in public.*

The historical inquiry dictated by *Richmond Newspapers* and its progeny examines the practice in place "at the time when our organic laws were adopted." *Richmond Newspapers*, 448 U.S. at 569. Because the Framers "were con-

cerned with broad principles, and wrote against a background of shared values and practices," *Globe*, 457 U.S. at 604, this historical inquiry focuses on the practices and beliefs held by the Founders at the time the constitution was adopted. *See generally McIntyre* v. *Ohio Elections Commission*, ____ U.S. ____, 115 S.Ct. 1511, 1517 & n.6 (1995) (citing the tradition of anonymity in the advocacy of political causes as supporting the First Amendment's protection for anonymous leafleting); *id.* at 1525, 1530 (Thomas, J., concurring in the judgment) ("Thus, our analysis must focus on the practices and beliefs held by the Founders. . . . While, like Justice Scalia, I am loath to overturn a century of practice shared by almost all of the states, I believe the historical evidence from the framing outweighs recent tradition."); *id.* at 1531 (Scalia, J., dissenting) ("'[O]n every question of construction, [we should] carry ourselves back to the time when the Constitution was adopted; recollect the spirit manifested in the debates; and instead of trying [to find] what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed.'") (citation omitted).

The Court of Appeals ignored the only relevant historical evidence of public access to juvenile trials and, in a footnote, described such proceedings as having a "long, entrenched, and well-founded tradition of confidentiality". App. at 8 n.4. That is a statement of historical hyperbole that neither can withstand objective scrutiny nor overcome the weight of the First Amendment's original meaning and history.

"Juvenile delinquency," as defined in the Act, is "the violation of a law of the United States committed by a person prior to his 18th birthday which would have been a crime if committed by an adult." 18 U.S.C. §5031. At the time when our organic laws were adopted, all children over the age of seven charged with committing acts violative of criminal laws "were subjected to arrest, trial, and in theory to punishment like adult offenders." *Gault*, 387 U.S. at 16. *See also id.* at 79-80 (Stewart J., dissenting). *See generally* Mack, The Juvenile Court, 23 Harv. L. Rev. 104, 106 (1909); Sussman, *Law of*

Juvenile Deliquency 13-14 (1959). DOJ Report at 70.

The notion that juveniles might be tried in secret is commonly traced to the passage of the first juvenile court statute in 1899 by the State of Illinois. *Gault*, 387 U.S. at 14-19. By that time, the tradition of open juvenile proceedings known to the Framers had been in place in America and England for centuries. Forty years after the Illinois statute was passed, the practice of closing juvenile proceedings still could not fairly be described as either longstanding or entrenched. In 1939, just six states and the District of Columbia excluded the public from juvenile courts, while 24 other states merely permitted such exclusion orders by order of the court. Note, *The Public Right of Access to Juvenile Delinquency Hearings*, 81 Mich. L. Rev. 1540, 1554 n.72 (1983); Jonas, *Press Access to the Juvenile Courtroom: Juvenile Anonymity and the First Amendment*, 17 Colum. L.J. & Social Probs. 287, 294-95 & n.54 (1982). Even by 1967, according to the *Gault* Court, the juvenile court's "claim of secrecy" was more "rhetoric than reality." 387 U.S. at 24.

> Disclosure of court records is discretionary with the judge in most jurisdictions. Statutory restrictions almost invariably apply only to the court records, and even as to those the evidence is that many courts routinely furnish information to the FBI and the military, and on request to government agencies and even to private employers.

387 U.S. at 24.[4]

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[4] Nor has it been uncommon for the names of juveniles to be disclosed in appellate opinions. *See Kent* v. *United States*, 383 U.S. 541, 543 (1966) ("Morris A. Kent, Jr., first came under the authority of the Juvenile Court . . . in 1959"); *In re Gault*, 387 U.S. 1, 4 (1967) ("On Monday, June 8, 1964, at about 10 a.m., Gerald Francis Gault and a friend, Ronald Lewis, were taken into custody"); *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 534-35 (1971) ("Joseph McKeiver, then age 16, in May 1968 was charged with . . . acts of juvenile delinquency"); *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308-309 (1977) ("On July 29, 1976, an 11-year-old boy, Larry Donnell Brewer, appeared at a detention hearing in Oklahoma Juvenile Court

The history of specialized *federal* juvenile proceedings is similar, albeit shorter. Before the Act was adopted in 1938, "[t]he juvenile offender against the laws of the United States was treated in the same manner as an adult." *United States* v. *Borders*, 154 F.Supp. 214, 215 (N.D. Ala. 1957), *aff'd* 256 F.2d 458 (5th Cir. 1958). Even under the Act, courts frequently have held open proceedings. *See, e.g., Nieves* v. *United States*, 280 F.Supp. 994, 1006 (S.D.N.Y. 1968).

The present situation, as one commentator has noted, remains a patchwork of sorts, one that does not establish a nation-wide mandatory or presumptive barrier to public access, particularly in the circumstances presented here. Jonas, 17 Colum. L.J. & Social Probs. at 295. *See also* IJA/ABA Joint Commission on Juvenile Justice Standards, *Juvenile Justice Standards: Standards Relating to Adjudication* (1979), Commentary to Standard 6.1 (noting "current practice of permitting interested observers to view the hearing at the discretion of the judge" even if not connected with the child's case). As the Third Circuit Court of Appeals recently concluded, "[f]or the most part, [juvenile court statutes] have not involved blanket prohibitions of access." *A.D.*, 28 F.3d at 1357.

Indeed, nine state statutes explicitly afford the press a right of access to cases such as this one: two of those states (including Illinois, birthplace of the juvenile court), expressly grant the press a right of access,[5] and seven others provide access where, as here, a juvenile aged 16 or older is charged

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on charges filed by state juvenile authorities alleging delinquency by second degree murder"). *Compare R.A.V.* v. *City of St. Paul, Minn.* 505 U.S. 377 (1992).

[5] Ill. Rev. Stat. Ch. 705, §405/1-5(6); N.M. Stat. 32A-2-16(B).

with violent felonies.[6] Two state statutes make no provision for the closure of juvenile trials,[7] and fourteen other states either have a presumption in favor of openness, or essentially leave the issue to the court's discretion.[8]

All but two of the remaining jurisdictions with statutes that presumptively close juvenile proceedings nonetheless permit the court to allow attendance by those with a "direct" or "proper" interest, language that some (but not all) courts have construed to include the press.[9] Two other closure statutes

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[6] Cal. Welf. & Inst. Code §676 (access required in cases involving a list of enumerated violent offenses); Del. Code tit. 10, §972(a) (proceedings involving juveniles charged with felonies must be open); Kan. Stat. Ann. §38-1652 (access required in all cases where the juveniles are 16 or older); Me. Rev. Stat. Ann. tit. 15, §3307(2) (felonies); Minn. Stat. Ann. §260.155 (1)(c) (all felonies allegedly committed by juveniles 16 and older); Mont. Code Ann. §41-5-601(2) (access required in felony cases); Utah Code Ann. §78-3a-33 (age 16 or older and charged with a felony; closure permitted if certain findings made).

[7] Neb. Rev. Stat. §43-277; Or. Rev. Stat. §419A.255.

[8] Colo. Rev. Stat. Ann. §19-1-106(2)(hearings must be open unless closure would serve the public's or the juvenile's interest); Fla. Stat. §39.052(1)(c) (court may close hearing only if it would serve the public interest and the welfare of the child); Ind. Code §31-6-7-10(b) (court should consider presumptive value of access in serving safety and interest of community before ordering closure); Iowa Code §232.39 (closure only if court finds that harm to juvenile outweighs public interest in open proceedings); Mich. Comp. Laws Ann. §712A.17(7)(permitting closure if necessary to protect juvenile welfare). Statutes providing that the court "may" admit or exclude the public include: Ariz. Juv. Ct. R. 19; Ark. Code Ann. §9-27-325(i); Md. R. Juv. Ct. 910(b); N.J. Stat. Ann. §2A:4A-60(g) (court "may" permit access if there is no "substantial likelihood [of] specific harm" to the juvenile); N.Y. Fam. Ct. Act §341.1; N.C. Gen. Stat. §7A-629; Ohio Rev. Code Ann. §2151.35; Tenn. Code Ann. 37-1-124; Tex. Fam. Code Ann. §54.08.

[9] *See, e.g., In the Matter of R.L.K.*, 269 N.W.2d 367, 370-71 (Minn. 1978) (concluding that "[t]he weight of authority is that the news media have a 'direct interest' in the work of the court" because "[t]he news media have a strong interest in obtaining information regarding our legal institutions and an interest in informing the public about how judicial power in juvenile courts is being exercised."); *Brian W.* v. *Superior Court*, 20 Cal.3d 618, 574 P.2d 788 (1978) (concluding that California legislature intended similar language "to allow press attendance at juvenile hearings"); *In the Matter of L.*, 24 Or. App. 257, 546 P.2d 153, 155 n.1 (1976) (same). The statutes currently using this language include: Ala. Code §12-15-65(a); Ga.

contain no language affording the trial court any discretion whatsoever.[10]

The Court of Appeals neither addressed the tradition of access known to the Framers nor the reality of modern juvenile closure statutes. Instead, the Court of Appeals focused on the label given to juvenile delinquency cases and treated them as modern *sui generis* proceedings with no historical counterpart. That the precise form of juvenile delinquency proceedings in place today was created after the Framers' time, however, does not end the relevant historical inquiry. A candid assessment of the substance of juvenile proceedings instead reveals that their only historical analog is criminal trials.

In that very regard, this Court repeatedly has held that modern delinquency proceedings so resemble criminal trials that, as a constitutional matter, they must provide a panoply of procedural rights associated with criminal proceedings. Thus, juveniles accused of delinquency have a constitutional right to adequate notice of the charges against them, the right to counsel, the right of confrontation and cross-examination, and the privilege against self-incrimination. *Gault*, 387 U.S. at 31-57. Proof beyond a reasonable doubt is required, *Winship*, 397 U.S. at 358, and the protections of the Double Jeopardy clause attach once the juvenile court begins to hear

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Code Ann. §15-11-28(c); Haw. Rev. Stat. §571-41(b); Idaho Juv. R. 22(b); Ky. Rev. Stat. §610.070(3); La. Code Juv. P. art. 69; Mass. Gen. Laws c. 119, §65 (requiring access in murder cases); Miss. Code Ann. §43-21-203(6); Mo. Rev. Stat. §211.171(5): Nev. Rev. Stat. §62.193(1); N.D. Cent. Code §27-20-24(5); Pa. Cons. Stat. Ann. §6336(d); S.C. Code Ann. §20-7-755; Vt. Stat. Ann. tit. 33, §5523(c); Va. Code §16.1-302; Wash. Rev. Code Ann. § 13.34.110; W. Va. Code §49-5-1(d); Wis. Stat. Ann. §48.299; Wyo. Stat. Ann. §14-6-224(b). Other jurisdictions similarly permit the court to open the proceedings in its discretion. *See* Alaska Stat. §47.10.070; D.C. Code Ann. §16-231(e) (expressly noting that press may be admitted); Okla. Stat. tit. 10, §1111 (court has discretion to open the proceedings, and must do so if the juvenile has been twice adjudicated delinquent); R.I. Gen. L. §14-1-30; S.D. Codified Laws Ann. §26-7A-36 (permitting access if "compelling reasons" found).

[10] Conn. Gen. Stat. Ann. §54-76h; N.H. Rev. Stat. Ann. §169-B:34.

evidence. *Breed*, 421 U.S. at 531. Similar procedural safeguards have been codified by the federal Act.[11]

In extending each of the foregoing constitutional protections to juveniles charged with delinquency, the Court focused not on the "sentiment [and] folklore" of juvenile proceedings, *Gault*, 387 U.S. at 21, or on the "civil label" attached to the system, but rather on the substance of what such proceedings portend for the accused and for the public's system of justice. *See Gault*, 387 U.S. at 27, 49-50; *Winship*, 397 U.S. at 365-66, Thus, in holding that there was "little to distinguish" a juvenile proceeding from a traditional criminal prosecution for purposes of Double Jeopardy analysis, the *Breed* Court stated:

> We believe it is simply too late in the day to conclude, as did the District Court in this case, that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years. ***For it is clear under our cases that determining the relevance of constitutional policies, like determining the applicability of constitutional rights, in juvenile proceedings, requires that courts eschew "the 'civil' label-of-convenience which has been attached to juvenile proceedings," . . . and that "the juvenile process . . . be candidly appraised."*** (citations omitted).

421 U.S. at 529 (emphasis added).

Just as the application of the Due Process Clause turns not on the label given to a particular proceeding, so too the question of the First Amendment's application to modern juvenile

[11] Juveniles must be notified upon arrest of their rights and the charges against them, §5033; have the right to counsel, §5034; have the right to a prompt arraignment and a speedy trial, §§5033, 5036; and are protected against double jeopardy, §5032.

courts depends not on wooden classifications of forms over substance but on the underlying nature of the proceedings. Juvenile deliquents are not the only social deviants who can make a credible claim to the rehabilitative benefits of a private judicial system, nor are they the only constituency that might prompt legislation to create specialized courts to address their needs. Whatever their label, when such proceedings involve the machinery of the state attempting to prove that an individual has broken the law and may thereby be deprived of liberty, the relevant precedent is the tradition of public access to criminal trials. The Court of Appeals' more formalistic analysis would render the First Amendment increasingly irrelevant to present and future reforms of the judicial process and grant the government sweeping authority to close the doors of newly named proceedings that modern legislators believe are best conducted in secret.

Even if the fundamentally coercive nature of juvenile delinquency proceedings is ignored and they are treated as essentially civil in nature, the long-standing tradition of public access to civil trials in general still would control the historical constitutional inquiry. *Richmond*, 448 U.S. at 580 n.17; *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 386 n.15 (1979). In *Globe*, for example, the state argued that because the public historically had been excluded from rape cases involving juvenile victims, there was no tradition of access to such trials upon which a First Amendment claim could be grounded. *See, e.g., Globe*, 457 U.S.at 614 (Burger, C.J., dissenting). The *Globe* Court explicitly held that the relevant historical inquiry could not be so easily narrowed:

> In *Richmond Newspapers*, the Court discerned a First Amendment right of access to *criminal trials* based in part on the recognition that as a general matter criminal trials have long been presumptively open. Whether the First Amendment right of access to criminal trials can be restricted in the context of any particular criminal trial, such as a murder trial (the setting for the dispute

> in *Richmond Newspapers)* or a rape trial, depends not on the historical access of that type of criminal trial but rather on the state interests assertedly supporting the restriction.

Globe, 457 U.S. at 605 n.13 (emphasis in original).

Similarly, because of the history of access to civil trials in general, whether the First Amendment right of access to civil trials can be restricted in the context of a juvenile delinquency trial depends not on the historical access to that particular type of civil trial, but on the state interests asserted in support of closure. Thus, even if viewed as civil in nature, juvenile delinquency proceedings fall within the general tradition of open civil trials for First Amendment purposes and satisfy the historical component of the *Richmond* test.

By ignoring the controlling historical inquiry, the Court of Appeals erroneously held that the First Amendment permits a presumptive rule of closure for juvenile proceedings. The importance of this issue to the public's understanding and possible reform of the juvenile justice system, and its implications for First Amendment jurisprudence with respect to present and future reforms of the justice system, warrant review by this Court.

2. *Access to juvenile trials plays a significant role in the functioning of the judicial process and the government as a whole.*

The salutary roles that public access plays in the operation of the judicial process is, at this stage of our history, beyond dispute. These benefits are not limited to protecting the accused. Public access enhances the quality and integrity of justice, demonstrates that the process operates fairly, and "permits the public to participate in and serve as a check upon the judicial process — an essential component in our structure of self-government." *Globe*, 457 U.S. at 606.

Those benefits are not dependent upon the age of the defen

dant. As the Third Circuit recently stated, "all the public interests in criminal proceedings . . . seem present and equally cogent" in juvenile delinquency trials. *A.D.*, 28 F.3d at 1358. But for the "sentiment and folklore" concerning the juvenile system, the issue hardly would merit discussion. After all, would a democracy founded on a healthy distrust of the powers of government surrender their young — and only their young — to be dealt with behind closed doors? It is one thing to agree that the Constitution grants legislatures a certain latitude in experimenting with various social reforms, the popularity and utility of which may vary widely over time. What the Constitution does not permit, however, is the notion that any group of reformers, past, present or future, no matter how well-intended, have so cornered the market on the wisdom of their policies that, in enacting their reforms, they may insulate them from meaningful, constitutionally protected debate by cutting off traditional means of acquiring information about the functioning of government.

That juvenile proceedings are judge-tried (one of the few remaining differences between adult and juvenile trials) further demonstrates the need for public access. As in *Press-Enterprise II*, "the absence of a jury, long recognized as 'an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge,' makes the importance of public access . . . even more significant." 478 U.S. at 12-13 (citation omitted). *See generally Richmond*, 448 U.S. at 572; *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 554-55 (1971) (Brennan, J., concurring in part and dissenting in part).

The public also has an interest in confirming for itself that those juveniles who commit violent acts are treated in a manner that effectively discourages such conduct by the defendants or by others. *See, e.g., Globe*, 457 U.S. at 606 (access "heighten[s] public respect for" and "permits the public to participate in . . . the judicial process"); *Richmond Newspapers*, 448 U.S. at 570-71 (open trials provide an "outlet for community concern, hostility and emotion").

Unfortunately, the Court of Appeals found it unnecessary to discuss the benefits of public access to juvenile trials. Instead, it simply stated that confidentiality was "essential" to the rehabilitative purpose of the Act. App. at 4. Such reasoning cannot be reconciled with the holding in *Globe* that public access plays a positive role in the functioning of rape trials involving juvenile victims despite the compelling state interest in protecting such victims from further trauma. There is no principled reason to construe the First Amendment as providing greater confidentiality protections for a juvenile rapist than for a juvenile rape victim. *Cf. Davis* v. *Alaska*, 415 U.S. 308 (1974).

Permitting public access does not deprive the juvenile offender of the most important (and the only mandatory) reforms of the system: separate intake, prosecution and incarceration from hardened adult criminals; limited incarceration periods; provisions for detention in foster homes or community-based facilities; and the availability of treatment programs. *See, e.g.*, 18 U.S.C. §§5035, 5037, 5039. These reforms, not the checkered history of closed trials, are the true hallmark of the juvenile justice system, and public access displaces none of them.

In sum, proper application of the experience and logic tests demonstrates that the public has a First Amendment right of access to juvenile delinquency trials. The same standard of individualized, case-specific findings therefore should govern whether a trial is closed to protect the privacy of a juvenile offender as govern whether the privacy interests of a juvenile victim justify such an order. The importance of this undecided constitutional issue to the juvenile and criminal justice systems, as well as to the public, warrants review by this Court.

C. *The standard of review applied by the Court of Appeals permits the closure of juvenile proceedings in violation of the First Amendment.*

The Court of Appeals purported to review the closure order of the District Court under the "highly dubious" assumption that the public's First Amendment right of access to criminal trials applied to juvenile proceedings, App. at 8 n.4 and 15. In fact, it applied a standard of review far more favorable to closure than that required by this Court in the context of criminal trials.

Under this Court's standard of review, the burden of proof rests on the proponent of closure, and the presumption is one of openness. *Globe*, 457 U.S. at 607-08; *Press-Enterprise II*, 478 U.S. at 13-14. Even where closure is sought to protect a criminal defendant's fair trial rights — perhaps the paramount constitutional interest — closure may be ordered "only if specific findings are made demonstrating that, first, there is a *substantial probability* that a defendant's right to a fair trial will be prejudiced by *publicity that closure would prevent*" and, second, "reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights." *Press-Enterprise II*, 478 U.S. at 14 (emphasis added).

As noted above, the Court of Appeals held that the Act established a presumption of closure permitted by the First Amendment. *See* App. at 13 (closure "is not an exception to some general rule of openness, but the norm"); *id.* at 14 (noting the Act's "strong preference" for confidentiality). *See also id.* at 16 n.8 and 17. Thus, rather than assuming that the First Amendment right of access applied (as its opinion purports to do), the Court of Appeals instead significantly departed from the established constitutional standard by applying a rule of presumptive closure, a break made possible only by its erroneous application of the *Richmond Newspapers* threshold test of experience and logic discussed above.

In addition to shifting impermissibly the constitutional presumption of openness, the Court failed to apply (or even

to mention) the applicable reviewing standard of whether the District Court's findings demonstrated a "substantial probability" that the juveniles would be harmed by publicity "that closure would prevent." *Press-Enterprise II*, 478 U.S. at 14. Such error in the past has been sufficient by itself for review by this Court. *Id.* at 14 (striking down California rule permitting closure based only on findings of "reasonable likelihood" of prejudice to a defendant rather than the appropriate "substantial probability" standard).

The factors relied upon by the Court of Appeals for affirming the closure order are insufficient as a matter of law under any reasonably searching standard of review. *Cf. Bose Corp.* v. *Consumers Union of the United States*, 466 U.S. 485 (1984). The first factor relied upon was the Act's "overarching objective of protecting juveniles from stigma." App. at 13. That factor, present in every case commenced under the Act, is no more case-specific than was the interest in protecting all juvenile rape victims that underlied the mandatory closure rule struck down in *Globe*.

The Court of Appeals also placed heavy reliance on the defendants' opposition to public access, reasoning that "the juveniles' own assessment of their interests is a highly reliable indicator of whether they will be irreparably stigmatized by open proceedings." App. at 14. Here too, the Court of Appeals broke from established First Amendment precedent. This Court consistently has held that the desires of a defendant to protect his fair trial interests are insufficient to justify closure. *See Richmond*, 448 U.S. at 559-60; *Press-Enterprise II*, 478 U.S. at 3; *El Vocero*, ____ U.S. ____, 113 S.Ct. at 2005-06. *Cf. Gannett*, 443 U.S. at 382 (the Sixth Amendment does not guarantee a defendant the right to compel a private trial). Contrary to the Court of Appeals, the assessment of a juvenile as to the potential effect of publicity on his rehabilitative interests is entitled to no greater deference than an adult's subjective view of the effect publicity might have on his fair trial rights.

The Court of Appeals also relied heavily upon the prosecution's desire to close the proceedings. More specifically, the Court held that the District Court was entitled to give weight to the prosecution's decision not to request that the juveniles be transferred for prosecution as adults. App. at 14. Had the prosecution requested such a transfer, the Act would have required the District Court to make specific findings as to whether transfer was appropriate. *See* 18 U.S.C. §5032. The prosecution's decision *not* to request a transfer, however, required absolutely no findings by the District Court and was inherently unreviewable. The Court of Appeals thus substituted inaction on the part of the prosecutor for findings by the District Court. Such reasoning turns the requirement of specific findings on its head and hardly evidences a substantial probability of harm in the absence of a closure order.

The Court of Appeals also cited the District Court's finding that two of the three juveniles had no prior criminal record. According to the Court of Appeals, this meant that all of the juveniles were "particularly amenable to rehabilitation." App. at 13. The Court of Appeals chose to ignore the District Court's further finding that all three juveniles were old enough "to benefit, in a rehabilitative way, from the public opprobrium attached to these charged acts." App. at 33. Nor did it consider the significance of the criminal record of one of the three defendants, their mature ages, or the absence of any findings with respect to their social background, intellectual development, psychological maturity, or response to past treatment efforts.

Similarly, the Court of Appeals failed to consider properly the serious and public nature of the racial and political attacks committed by the defendants or the government's decision to pursue federal civil rights charges. Rather, in a stunning reversal of established precedent, the Court reasoned that the heinous nature of the defendants' conduct, and the resulting public concern and outrage, supported the closure order. App. at 14 n.7. *Compare Richmond*, 448 U.S. at 570-71.

Equally erroneous was the Court of Appeals' treatment of

the prior lawful publicity surrounding the defendants, publicity which resulted in the widespread disclosure of their identities and many of the details of their conduct. According to the Court of Appeals, the identities of the juveniles had been so widely publicized that redaction of their names from the proceedings would have been "an exercise in futility." App. at 16. Rather than acknowledging that closure of the trial therefore would not effectively serve any compelling confidentiality interest, the Court of Appeals castigated the media for reporting on the defendants' civil rights violations, which were committed on public streets and at places of public assembly. The Globe's access argument was characterized as an attempt to "leverage" partial information into an "unfettered right of access," thereby granting the media "a dangerous control over important state interests." App. at 14-15.

Such a critique might be more understandable if information about the juveniles or their actions had been unlawfully obtained by the press. There was, however, nothing illegal or improper about the public reports concerning the defendants' attacks on minority citizens. There were numerous victims of and witnesses to the defendants' conduct. As the District Court acknowledged, one of the juveniles was interviewed by local press and many other details of their conduct were disclosed in the related prosecution of an adult coconspirator. App. at 33. The extent to which the public already was aware of the details of the case severely undercut the asserted basis for closing the trial. Taking that factor into account would not give the media a "dangerous control" over the government. Rather, to blind one's self to what the public already knows when restricting First Amendment rights would grant the government a dangerous control over the public's Speech, Press and Petition rights. *See generally Globe*, 457 U.S. at 609-10; *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 110 & n.3 (1979) (Rehnquist, J., concurring). Unless reviewed by this Court, the Court of Appeals' holding will stand for the proposition that courts may restrict access to judicial proceedings in order to protect the "con-

fidentiality" of information already lawfully in the hands of the citizenry.

II. The Court of Appeals' interpretation of the Act as supplanting the public's common law right of access to judicial proceedings conflicts in principle with that of the Third Circuit Court of Appeals and is an important question of federal law that has not been, but should be, decided by this Court.

Section 5032 of the Act provides that juvenile proceedings may be convened "at any time and place within the district, in chambers or otherwise." The Court of Appeals construed §5032 as leaving the question of public access to the trial court's discretion. App. at 12. The Court further held, however, that the Act supplanted the public's common law right of access to juvenile trials and engrafted a presumption of closure on such proceedings. App. at 13, 14, 16 n.8 and 17.

Despite construing the Act as requiring a presumption of closure, the Court concluded that its interpretation of the Act did not "significantly alter or restrict [the] common law right" of access to judicial proceedings. App. at 17. To the contrary, as decisions of this Court have made clear, the common law right of access establishes that trials are presumptively open to the public, not presumptively closed. *See generally Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589 (1978) (common law presumption is in favor of access); *Gannett*, 443 U.S. at 386 (noting "common law rule of open proceedings").

In construing the same provisions of the Act, the Third Circuit Court of Appeals found no such presumptive rule of closure. *See A.D.*, 28 F.3d at 1361 and n.7. Rather, in addressing the Act's impact on the public's right of access to juvenile delinquency proceedings, the Third Circuit directed trial courts to adhere to the substantial body of case law delineating the public's common law and constitutional rights of access to criminal and civil cases. *Id.* That case law squarely establishes the proposition that all trials are presumptively

open to the public, a position diametrically contrary to the First Circuit Court of Appeals' interpretation of the Act.

Trial courts faced with requests to exclude the public from juvenile trials can be expected to address the issue first under the common law in order to avoid unnecessary constitutional litigation. Accordingly, the conflict between, on the one hand, the First Circuit's interpretation of the Act as supplanting the public's common law right of access with a presumptive rule of closure and, on the other hand, the Third Circuit's construction of the Act as consistent with the common law, warrants resolution by this Court.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the First Circuit should be granted.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 94-2170

UNITED STATES,
APPELLEE,

v.

THREE JUVENILES,
DEFENDANTS-APPELLEES.

GLOBE NEWSPAPER COMPANY,
INTERVENOR-APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. PATTI B. SARIS, *U.S. District Judge*]

Before
TORRUELLA, *Chief Judge*,
BOWNES, *Senior Circuit Judge*,
and SELYA, Circuit Judge.

Jonathan M. Albano, with whom *Mark W. Batten*, *Alicia L. Downey* and *Bingham, Dana & Gould*, were on brief for appellant.
Eileen Penner, Attorney, Department of Justice, with whom *Deval L. Patrick*, Assistant Attorney General, and *Jessica Dunsay Silver*, Attorney, Department of Justice, were on brief for appellee, United States.

July 31, 1995

TORRUELLA, *Chief Judge*. This appeal requires us to interpret and apply the confidentiality provisions of the Federal Juvenile Delinquency Act (the "Act"), 18 U.S.C. §§ 5031-

5042. We hold that the Act authorizes, but does not mandate, closure of juvenile proceedings. Although we disagree with the district court's interpretation of the statute, we nevertheless find that the court's decision to close the proceedings was within its discretion and proper under the Act.

I.

On July 19, 1994, the government charged three juveniles with civil rights violations under the Federal Juvenile Delinquency Act (the "Act"), 18 U.S.C. §§ 5031-5042. The charges involved hate crimes allegedly committed by the juveniles as members of a white supremacist group. On the same day that the juveniles were charged, the grand jury indicted an adult, Brian Clayton, with violations of 18 U.S.C. § 241 (conspiracy to violate civil rights) and § 371 (conspiracy to intimidate and interfere with federally protected activities on account of race). The indictment charges that Clayton committed these violations as a member of the same white supremacist group to which the three juveniles allegedly belonged.

Just prior to the juveniles' arraignments on July 20, 1994, intervenor-appellant Globe Newspaper Company (the "Globe") moved to intervene in the juvenile proceedings for purposes of gaining access to the arraignments and subsequent proceedings, as well as to any judicial documents filed in connection with those proceedings. The district court allowed the Globe to intervene and granted it access to certain redacted court documents, but denied public access to the arraignments on the grounds that § 5038 of the Act mandated closure of the proceedings. *United States* v. *Three Juveniles, Globe Newspaper Co.*, 862 F.Supp. 651, 658 (D. Mass. 1994). The court alternatively held that, even if closure were discretionary, it would close the proceedings in this case. *See id.* at 658. The Globe argues on appeal that the First Amendment creates a right of access to juvenile proceedings, that the district court erred by interpreting the Act to mandate closure of juvenile proceedings, and that the factors set forth and

relied upon by the district court in its opinion are not sufficiently compelling to justify closure of the proceedings.

II.

The issues presented by this appeal involve the interpretation and constitutionality of certain provisions of the Act. Because these are purely questions of law, our review is plenary. *See United States* v. *Gifford*, 17 F.3d 462, 472 (1st Cir. 1994); *see also United States* v. *M.I.M.*, 932 F.2d 1016, 1019 (1st Cir. 1991) (district court's interpretation of statute is reviewed *de novo).*

The Act governs the detention and disposition of juveniles charged with delinquency. 18 U.S.C. §§ 5031-5037. The statute also contains confidentiality provisions, set forth in §§5032 and 5038.[1] Enacted in 1938, the Act was intended "to

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[1] Section 5032 provides in relevant part that:

> . . . any proceedings against [an alleged juvenile delinquent] shall be in an appropriate district court of the United States. For such purposes, the court may be convened at any time and place within the district, *in chambers or otherwise*

18 U.S.C. § 5032 (emphasis added). The second confidentiality provision, § 5038, provides that:

> (a) Throughout the upon the completion of the juvenile delinquency proceeding, the records shall be safeguarded from disclosure to unauthorized persons. The records shall be released to the extent necessary to meet the following circumstances:
>
> (1) inquiries received from another court of law;
> (2) inquiries from an agency preparing a presentence report for another court;
> (3) inquiries from law enforcement agencies where the request for information is related to the investigation of a crime or a position within that agency;
> (4) inquiries, in writing, from the director of a treatment agency or the director of a facility to which the juvenile has been committed by the court;
> (5) inquiries from an agency considering the person for a position immediately and directly affecting the national security; and

provide for the care and treatment of juvenile delinquents." H.R. Rep. No. 2617, 75th Cong., 3d Sess. 1 (1938). "[T]he Act's underlying purpose is to rehabilitate, not to punish, so as 'to assist youths in becoming productive members of our society. . . .'" *In re Sealed Case (Juvenile Transfer)*, 893 F.2d 363, 367 (D.C. Cir. 1990) (quoting S. Rep. No. 1011, 93d Cong., 2d Sess. 22 (1974)); *accord United States* v. *Welch*, 15 F.3d 1202, 1211 n.12 (1st Cir. 1993), *cert. denied*, 114 S.Ct. 1863 (1994). To this end, the Act attempts to insulate juveniles from the stigma of a criminal record. *In re Sealed Case*, 893 F.2d at 367-68; *see also* S. Rep. No. 1989, 75th Cong., 3d Sess. 1 (1938) ("[A] juvenile delinquent for whom there is some hope of rehabilitation should not receive the stigma of a criminal record that would attach to him throughout his life."). The confidentiality provisions of the Act are therefore quite essential to the Act's statutory scheme and overarching rehabilitative purpose.

Based on its reading of the statute and its legislative history, the district court held that the Act allowed it some discretion to disclose information about juvenile proceedings, so long

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(6) inquiries from any victim of such juvenile delinquency, or if the victim is deceased from the immediate family of such victim, related to the final disposition of such juvenile by the court in accordance with section 5037.

Unless otherwise authorized by this section, information about the juvenile record may not be released when the request for information is related to an application for employment, license, bonding, or any civil right or privilege. Responses to such inquiries shall not be different from responses made about persons who have never been involved in a delinquency proceeding. . . .

(c) During the course of any juvenile proceeding, all information and records relating to the proceeding, which are obtained or prepared in the discharge of an official duty by an employee of the court or an employee of any other governmental agency, shall not be disclosed directly or indirectly to anyone other than the judge, counsel for the juvenile and the Government, or others entitled under this section to receive juvenile records. . . .

(e) Unless a juvenile who is taken into custody is prosecuted as an adult neither the name nor picture of any juvenile shall be made public in connection with a juvenile delinquency proceeding. . . .

as the disclosure does not contravene the express mandate of § 5038(e) that the juvenile's name and picture not be made public. 862 F.Supp. at 658. This construction of the Act, according to the district court, is also consistent with the Supreme Court's First Amendment jurisprudence. *Id.* at 655-56 (citing, *inter alia*, *Globe Newspaper Co.* v. *Superior Court for the County of Norfolk*, 457 U.S. 596, 608 (1982)). We turn now to the Globe's contention that the district court's interpretation was in error.

III.

As the district court recognized, the Act implicates First Amendment concerns, and thus must be interpreted with the Supreme Court's First Amendment jurisprudence in mind. It is well-settled that the First Amendment provides a right of public access to most proceedings growing out of *adult* criminal cases. *See Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1, 3 (1986) *("Press-Enterprise II")* (First Amendment provides right of access to transcript of preliminary hearing of a criminal prosecution); *Press-Enterprise Co.* v. *Superior Court of California*, 464 U.S. 501, 508-510 (1984) *("Press-Enterprise I")* (First Amendment creates "presumption of openness" of *voir dire* proceedings in criminal case); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 580 (1980) (plurality opinion) (the public's right to attend criminal trials is implicit in First Amendment's guarantees).[2] This First Amendment right of access is not absolute, however. Competing values and interests may warrant a denial of access to proceedings and records in some situations. *Press-Enterprise II*, 478 U.S. at 9; *see also Rivera-Puig* v. *Garcia-Rosario*, 983

[2] Although some circuits have recognized a public right of access to civil trials as well, *see, e.g.*, *Republic of Philippines* v. *Westinghouse Electric Corp.*, 949 F.2d 653, 659 (3d Cir. 1991), this Circuit has never decided whether the First Amendment mandates such a general right of access. *Anderson* v. *Cryovac, Inc.*, 805 F.2d 1, 10-11 (1st Cir. 1986). We find it unnecessary to do so here.

F.2d 311, 314 (1st Cir. 1992). In such a case, reviewing courts must determine whether the closure is "essential to preserve higher values" and "narrowly tailored to serve that interest." *Press-Enterprise I*, 464 U.S. at 510.

Since the "Juvenile Court" movement began in this country at the end of the last century, all states, the District of Columbia, and Puerto Rico have adopted juvenile court systems. *See In re Gault*, 387 U.S. 1, 14 (1967). The development of the juvenile justice system throughout the country has been marked by a "special sensitivity" about information regarding juveniles and "the impact that public dissemination of such information may have on the youths involved." *United States* v. *A.D., PG Publishing Co.*, 28 F.3d 1353, 1357 (3d Cir. 1994) *("PG Publishing")*. Accordingly, many, if not most, states currently authorize or mandate closure of juvenile proceedings.[3] The Supreme Court has also acknowledged this tradition of confidentiality of juvenile proceedings. *See, e.g., In re Gault*, 387 U.S. at 25 ("[T]here is no reason why, consistently with due process, a State cannot continue, if it deems appropriate, to provide and to improve provision for the confidentiality of records of police contacts and court action relating to juveniles.").

The Supreme Court has never determined whether the First Amendment right of public access attaches to juvenile pro-

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[3] *See, e.g.*, Ala. Code 12-15-65(a); Alaska Stat. 47.10.070(a); Conn. Gen. Stat. Ann. 54-76h; D.C. Code Ann. 16-2316(e); Ga. Code Ann. 15-11-28(c); Hawaii Rev. Stat. Tit. 31 s. 571-41(b); Idaho Juv. R. 22(b); Ill. Rev. Stats. Ch. 705 s. 405/1-5(6); Ky. Rev. Stat. Ann. 610.070(3); Miss. Code Ann. 43-21-203(6); Mo. Ann. Stat. 211.171(5); Nev. Rev. Stat. 62.193(1); N.H. Rev. Stat. Ann. 169 B:34; N.D. Cent. Code 27-20-24(5); Pa. Cons. Stat. Ann. 6336(d); R.I. Gen. L. 14-1-30; S.C. Code Ann. 20-7-755; S.D. Codified Laws Ann. 26-7A-36; Vt. Stat. Ann. Tit. 33 s. 5523(c); Va. Code 16.1-302; Wash. Rev. Code Ann. 13-34.110; W. Va. Code 49-5-1(d); Wis. Stat. Ann. 48-299(1)(a); Wyo. Stat. 14-6-224(b) (all authorizing or requiring that the general public be excluded from juvenile proceedings). *See also* Calif. Welf. & Inst. Code 676(a); Me. Rev. Stat. Ann. Tit. 15 s. 3307(2)(B); Mass. Gen. Laws Ann. ch. 119 s. 65; Minn. Stat. Ann. 260.155(c); Okla. Stat. Ann. Tit. 10 s. 1111(A)(1); Tex. Fam. Code Ann. 54-08; Utah Code Ann. 78-3a-33(2) (all barring the public from juvenile proceedings except for those involving certain classes of offenses, such as murder, or when the juvenile is older than fifteen years).

ceedings, and thus has not decided whether across-the-board closure of such proceedings violates the First Amendment. *See PG Publishing*, 28 F.3d at 1357. In a very instructive case, however, the Court addressed whether the First Amendment allows a statutory bar to public access to adult criminal trials during the testimony of sex-offense victims who are minors. *See Globe*, 457 U.S. at 607. Although the Supreme Court acknowledged the compelling state interests of protecting the victims from further trauma and embarrassment and encouraging other victims to come forward, it held that neither interest sufficiently justified a blanket closure in every case involving a youthful sex-offense victim. *Id.* at 607. The Court explained:

> [A]s compelling as that interest [in protecting the minor victims] is, it does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim. . . . Section 16A, in contrast, requires closure even if the victim does not seek the exclusion of the press and general public, and would not suffer injury by their presence. . . . In short, § 16A cannot be viewed as a narrowly tailored means of accommodating the State's asserted interest: That interest could be served just as well by requiring the trial court to determine on a case-by-case basis whether the State's legitimate concern for the well-being of the minor victim necessitates closure. Such an approach ensures that the constitutional right of the press and the public to gain access to criminal trials will not be restricted except where necessary to protect the State's interest.

Id. Significantly, the Court added:

> We emphasize that our holding is a narrow one: that a rule of mandatory closure respecting the testimony of minor sex victims is constitutionally infirm. *In individual cases, and under appropriate circumstances, the First*

> *Amendment does not necessarily stand as a bar to the exclusion from the courtroom of the press and general public during the testimony of minor sex-offense victims. But a mandatory rule, requiring no particularized determinations in individual cases, is unconstitutional.*

Id. at 611 n.27 (emphasis added).

In the instant case, the Globe argues that the public does have a First Amendment right of access to juvenile proceedings. Relying on the Court's language in *Globe*, 457 U.S. at 607-08, 611, the Globe contends that the district court's construction of the Act as imposing "a mandatory closure requirement on all juvenile proceedings" renders the Act unconstitutional. Assuming *arguendo* that the First Amendment right of public access does apply to some degree to juvenile proceedings,[4] we agree that while the *Globe* case is not directly applicable here, the Court's reasoning in that case strongly suggests that the district court's preferred reading of the Act raises some serious First Amendment concerns.

There may, however, be no need to resolve this potential conflict between the Act and the First Amendment. It is a well-established rule of statutory construction that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, [reviewing courts should] construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo Corp.* v. *Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988). We therefore must examine the Act's purpose and language to determine whether it is necessary to call the Act's constitutionality into question by construing it to mandate an across-the-board bar to public access.

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[4] This is, however, a highly dubious assumption, particularly in light of the long, entrenched, and well-founded tradition of confidentiality regarding juvenile proceedings, and the compelling rehabilitative purposes behind this tradition. *See supra* note 2; *see also In re Sealed Case (Juvenile Transfer)*, 893 F.2d 363, 367 (D.C. Cir. 1990); discussion *infra* section IV.

IV.

As we have explained, the primary purpose of the Act is to facilitate the rehabilitation of juvenile delinquents. *In re Sealed Case*, 893 F.2d at 367. Protection of the juvenile from the stigma of a criminal record by preserving the confidentiality of proceedings is an essential element of the Act's statutory scheme. *See* discussion *supra* at 5.

The government argues that the Act's rehabilitative purpose can only be effectuated by prohibiting public disclosure of information about juvenile proceedings, and contends that the Act's language explicitly so directs. The Globe contends, conversely, that the Act's language does not mandate closure, but leaves the decision to the district court's discretion, to be determined on a case-by-case basis. In so contending, the Globe relies heavily on *PG Publishing*, 28 F.3d at 1359-60, and we agree that the Third Circuit's reasoning in that case is quite persuasive.

As the district court acknowledged, the Act does not expressly require a closed hearing for a juvenile proceeding. 862 F.Supp. at 655. Section 5032 of the Act provides that juvenile proceedings may be convened "at any time and place within the district, in chambers or otherwise." This phrase certainly seems to contemplate that district court judges will exercise their discretion to determine when, where, and in what manner juvenile proceedings will be conducted. Moreover, we agree with the Third Circuit that the language "in chambers or otherwise" strongly implies that the district court's discretion includes "a decision regarding the availability and degree of public access." *PG Publishing*, 28 F.3d at 1359. This section of the Act therefore provides "strong evidence" that Congress did not intend mandatory closure of all juvenile proceedings, but rather left the question of public access to the district court's discretion. *Id.*

The first paragraph of § 5038(a) of the Act states that "the records [of any juvenile proceeding] shall be safeguarded from disclosure to unauthorized persons." Pointing to this pro-

vision, the government contends that the Act explicitly prohibits disclosure of juvenile records except to the entities enumerated in subsequent paragraphs, and that this evidences Congressional intent to create an across-the-board ban on disclosure to any and all other parties. We do not think, however, that this language is quite so conclusive; the section does not explicitly *mandate* denial of public access to juvenile records, but provides only that the records are to be "safeguarded from disclosure to *unauthorized* persons." Giving this phrase a less strained, more common sense reading, we think that the section prohibits disclosure only to those persons not authorized *by the district court* to receive such information. *See PG Publishing*, 28 F.3d at 1359 (reaching the same conclusion). The only express prohibitive mandate contained in all of § 5038(a) rests in the final paragraph, which prohibits the district court from authorizing disclosure in situations "when the request for information is related to an application for employment, license, bonding or any civil right or privilege."

Nor do we think that the parties enumerated in paragraphs (a)(1) through (a)(6) of § 5038 constitute the exclusive list of persons intended by Congress to ever receive information about juvenile proceedings. Rather, the paragraphs merely list those persons who have a right to obtain juvenile records upon request. Indeed, if this were meant to be an exclusive list, then the final paragraph of the section (prohibiting disclosure when the information is sought in relation to a job application, etc.) would be superfluous. *PG Publishing*, 28 F.3d at 1360. Read as a whole, then, we think that § 5038(a) further evidences Congressional intent to leave disclosure of juvenile records within the district court's discretion.[5]

[5] The language of § 5038(c) does not conflict with our interpretation. This section provides that all information and records relating to the proceeding "shall not be disclosed directly or indirectly to anyone other than the judge, counsel for the juvenile and the Government, *or others entitled under this section to receive juvenile records.*" (Emphasis added). We read the underlined phrase to mean any other persons authorized by the court to receive information under § 5038(a).

The only section of the Act that suggests that Congress intended an across-the-board bar to public access is 5038(e), which provides that "neither the name nor picture of any juvenile shall be made public in connection with a juvenile delinquency proceeding." The district court reasoned that if it were to permit public access to the proceedings, the juveniles' names would certainly, unavoidably, be made public, in direct contravention of § 5038(e). 862 F.Supp. at 655. Because it saw no way to obey the letter of § 5038(e) short of closing the proceedings, the district court interpreted the Act to mandate closure. *Id.* at 655-56. The government now urges us to affirm this interpretation, arguing that any other reading would render the confidentiality provisions a nullity.

On this point, however, we are persuaded once again by the reasoning of the *PG Publishing* court, which explained:

> A prohibition against making a juvenile's name or picture available to the public, however, strikes us as an indirect and unlikely way for Congress to stipulate that all hearings under the Act will be closed to the public. State statutes that restrict access to juvenile proceedings generally do so directly and clearly.... We think it far more likely that § 5038(e) was intended not to limit the discretion of trial judges to regulate access to juvenile delinquency proceedings, but to foreclose law enforcement officials from holding press conferences at which the name and picture of the juvenile would be "made public in connection with a juvenile delinquency proceeding."

28 F.3d at 1360-61 (quoting 18 U.S.C. § 5038(e)). Certainly, if Congress intended to mandate closure of all juvenile proceedings, it could have done so expressly and directly. *Cf.*, *e.g.*, 18 U.S.C. § 3509(e) (authorizing "the exclusion from the courtroom of all persons, including members of the press, who do not have a direct interest in the case" during the testimony of child witnesses).

We also agree with the Globe that even if the prohibition on disclosure of a juvenile's name and picture prevents unfet-

tered public access to proceedings, it does not necessarily follow that § 5038(e) commands total closure. The statutory directive can in many instances be satisfied by other, less restrictive means. For example, public access to records or proceedings poses no risk of disclosure of the juveniles picture, as cameras can be banned from the proceedings and names redacted from documents. Similarly, there are methods short of complete closure, such as the use of initials or pseudonyms, that would protect against inadvertent disclosure of the juveniles' names.

Finally, we think that interpreting the entire Act in light of § 5038(e), rather than vice versa, attributes undue significance to that section. To hold that the Act must mandate closure because of § 5038(e) is effectively to ignore strong indicia elsewhere in the statute that Congress did not intend to create a blanket prohibition on public access, but rather to vest discretion with the district courts to fashion proceedings in a manner most appropriate for each individual case.

For these reasons, we hold that the Act does not mandate across-the-board closure for all juvenile proceedings, but merely authorizes closure, or any other measures designed to ensure confidentiality, to be determined on a case-by-case basis at the discretion of the district court.[6] We think that this interpretation fully comports with the purpose and language of the statute as a whole, and is far preferable to a strained construction of the Act that mandates complete closure and thus triggers First Amendment concerns.

V.

We turn now to the Globe's final contentions on appeal, namely, that the district court's articulated reasons for closing the proceedings are not "sufficiently compelling" to justify closure in this case, that the court's order does not effec-

[6] We emphasize that we are not holding or even suggesting that juvenile proceedings ought to be open. We are merely holding that the Act does not invariably require them to be closed.

tively serve its intended interests, and that the order is not "narrowly tailored." The Globe offers several theories in support of these contentions, none of which we find persuasive.

As an initial matter, we note that the Globe's arguments on this point seem to rest on the assumption that juvenile proceedings should be open as a rule, and only compelling interests justify closure. Certainly, a district court must exercise its discretion soundly, and must articulate reasons which are supported by the record and in keeping with the policies of the Act. Contrary to the Globe's implied assumption, however, the language and policy of the Act, as well as the history of juvenile justice proceedings in this country over the past century, indicate that a court's exercise of its discretion to close juvenile proceedings is not an exception to some general rule of openness, but the norm.

The district court's findings here were meticulously specific. The court first correctly noted the Act's overarching objective of protecting juveniles from stigma in order to facilitate rehabilitation. 862 F.Supp. at 657. The court found that these juveniles were particularly amenable to rehabilitation, based on the prosecutor's decision not to seek transfer to adult status and the clean prior records of two of the juveniles. *Id.* The district court also gave weight to the juveniles' opposition to open proceedings, noting that the media had already subjected the youths to overwhelming publicity, and concluding that adequate protection of the juveniles from stigma and public scrutiny would be impossible unless the proceedings were closed. *Id.*

The Globe contends that the court should not have relied upon the opposition of the juveniles themselves to open proceedings, as such a wish is "unremarkable" and "does not suggest that this case involves any individualized concern for closure different from those present in virtually every juvenile proceeding." As the government points out, however, protection of the accused is one of the strongest justifications for allowing public access to the proceeding. When the accused juvenile, on advice of counsel, opposes public access, this

justification is vitiated. Further, the juveniles' own assessment of their interests is a highly reliable indicator of whether they will be irreparably stigmatized by open proceedings. Given the Act's strong policy in favor of protecting juveniles from such stigma, we think the juveniles' opposition to open proceedings was a relevant factor for the district court to consider.

The Globe also attempts to downplay the significance of the fact that the juveniles had not been transferred for adult prosecution. The prosecutors' determination not to transfer the juveniles is based on an evaluation of criteria set forth by the Act, including the age and social background of the juvenile, the nature of the alleged offense, the extent of the juvenile's prior record, and the juvenile's present intellectual development and psychological maturity. 18 U.S.C. § 5032. Because all of these criteria are highly significant indicators of the amenability of the juvenile to rehabilitation, they are also very relevant to the court's decision whether to close the proceedings. By taking the prosecutors decision into consideration, then, the court was also giving weight to these factors. That these factors will often militate in favor of closure in juvenile proceedings does not in any way diminish their relevance or weight; to the contrary, it merely underscores the Act's strong preference for preserving the confidentiality of juvenile records.[7]

The Globe also contends that the district court's order does not effectively serve its intended interests, as nothing in the court's opinion indicates that the closure order will "effectively preserve the juveniles' confidentiality." In its opinion, the district court recognized that media coverage of the proceedings had already been extensive, that one of the juveniles

[7] The Globe also suggests that the heinous nature of the juveniles' alleged conduct augments the public interest in "seeing justice done," and therefore supports opening the proceedings. Given the Act's policy of preventing stigma, however, this argument is completely misguided. It is precisely *because* the alleged crimes have provoked so much public outrage and antipathy that closure becomes more appropriate, in order to best effectuate the Act's purpose.

had already been interviewed, that the juveniles had already been identified several times in the press, and that many of the details of their alleged conduct had already been disclosed through the related adult criminal prosecution of Clayton. 862 F.Supp. at 659. The Globe now points to these facts and argues that because all this information had already been aired in the press, "whatever stigma the juveniles may acquire will attach even if the press is excluded from the proceedings." Therefore, according to the Globe, because the district court's closure order cannot possibly preserve the juveniles' anonymity, it is ineffective, and cannot stand.

This is a flawed, circular argument with disturbing ramifications. Essentially, the Globe is arguing that because the press has already obtained and published *some* information, any further attempts by the district court to preserve confidentiality are either futile or irrelevant. Contrary to the Globe's contention, the fact that the juveniles have already suffered stigma does not justify removing or denying them all further protections created by the Act. Moreover, we agree with the government that to allow the media to "leverage" partial information into an unfettered right of access to otherwise nonpublic proceedings would grant the media a dangerous control over important state interests. We therefore reject the Globe's contentions on this point, and hold that the district court's closure order sufficiently serves its stated purpose of preserving what confidentiality remains of the proceedings.

The Globe also argues that the district court's closure order is not "narrowly tailored." Because the district court could have effected its intended purpose through less restrictive means, such as using pseudonyms and redacting identifying information from proceedings and records, the Globe argues, its total ban on public access was unwarranted. Again, we note that the Globe is relying on the dubious assumption that district courts must meet the extremely stringent First Amendment standards applied to adult criminal cases in order to justify closure of juvenile proceedings.

Even assuming, however, that such standards are applicable here, we find that they are sufficiently met by the

court's order. As the district court recognized, it could not bar the media from publishing information legally obtained. 862 F.Supp. at 657 (citing *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979)). Because it had no way of ensuring that certain identifying information would remain confidential if the proceedings were open to the press, the court concluded that it had no less restrictive alternative to closing the proceedings. *Id.* We think this reasoning is quite sound. The identities of the juveniles had already been widely publicized. Redaction of the juveniles names from the proceedings as the Globe suggests would therefore have been an exercise in futility. Realistically, the press would merely publish detailed accounts of the "redacted" proceedings, substituting the identifying information previously obtained. In short, redaction, or any other compromise measure, would have been ineffective in preserving the confidentiality of the proceedings.[8]

Finally, the Globe contends that the district court's order violates the public's common law right of access to proceedings and records. It is true that "courts of this country recognize a general right to inspect . . . judicial records and documents." *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 597 (1978). The Supreme Court has explained, however, that this right is not absolute; rather, the decision as to such access is best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts

[8] We likewise reject the Globe's arguments that the district court's order impermissibly infringes the public right of access to court records by shifting the burden of obtaining access onto the public. Rather than sealing the case file and requiring interested parties to move for further disclosures, the Globe suggests, the court should have done just the opposite and required trial counsel to move for impoundment of particular documents. This contention is yet another example of the Globe's attempt to force juvenile proceedings into the First Amendment framework developed for adult criminal proceedings. Section 5038(a) of the Act specifically provides that throughout a juvenile delinquency proceeding, "the records shall be safeguarded from disclosure to unauthorized persons." As we have explained, this section grants the district court the discretion to release juvenile records as it deems appropriate. The district court's order here meticulously tracks this language of the Act, and we therefore find that its method of determining public access to court records is entirely proper.

and circumstances of the particular case." *Id.* at 598-99. Assuming that this common law right of access applies to juvenile court records,[9] we do not think that the district court's order here improperly infringes on this right. In this context, the qualified common law right of access to proceedings has been supplanted by the statutory scheme of the Act. As we interpret them, however, the Act's confidentiality provisions do not significantly alter or restrict that common law right in any way, but leave public access to the sound discretion of trial courts. Because the district court's order fully comports with the provisions of the Act and is thus a proper exercise of its discretion, the order cannot be said to infringe on any pre-existing common law right of access. We therefore reject the Globe's arguments on this point.

VI.

In sum, we hold that the Act authorizes, but does not mandate, the closure of juvenile proceedings. The district court's closure order was fully justified on the record and was therefore an entirely proper exercise of its discretion under the Act.

Affirmed.

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[9] It is not altogether clear that this common law right of access applies to juvenile court records, in light of the long, sound tradition of preserving the confidentiality of juvenile proceedings. *See supra* note 4.

United States Court of Appeals
For The First Circuit

No. 94-2170

UNITED STATES,
APPELLEE,

v.

THREE JUVENILES,
DEFENDANTS, APPELLEES.

GLOBE NEWSPAPER COMPANY,
INTERVENOR, APPELLANT.

BEFORE
TORRUELLA, *Chief Judge*,
BOWNES, *Senior Circuit Judge*,
SELYA, CYR, BOUDIN, STAHL and LYNCH,
Circuit Judges.

ORDER OF COURT

Entered: August 25, 1995

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular, active service and a majority of said judges not having voted to order that the appeal be heard or reheard en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

FRANCIS P. SCIGLIANO
Clerk

[cc: Mr. Albano, Ms. Penner]

United States District Court
District of Massachusetts

CR. NO. 94-10181-PBS

UNITED STATES OF AMERICA,

v.

THREE JUVENILES,

DEFENDANTS,

v.

GLOBE NEWSPAPER COMPANY,

INTERVENOR.

MEMORANDUM AND ORDER ON GLOBE NEWSPAPER COMPANY'S MOTION FOR ACCESS TO ARRAIGNMENT, PRETRIAL, AND TRIAL PROCEEDINGS

SEPTEMBER 8, 1994

SARIS, U.S.D.J.

INTRODUCTION

On July 19, 1994, the government filed an information against three juveniles charging them with civil rights violations under the Federal Juvenile Delinquency Act (the "Act"), 18 U.S.C. §§ 5031-5042. On the same day, in a connected case, the grand jury indicted an adult, Brian Clayton, with violations of 18 U.S.C. § 241 (conspiracy to violate civil rights) and 18 U.S.C. § 371 (conspiracy to intimidate and interfere with federally protected activities on account of race). The indictment charges that Clayton committed these violations as a member of the New Dawn Hammerskins, a white supremacist group.

Just prior to the arraignments of the juveniles on July 20, 1994, the Globe Newspaper Company *("Globe")* moved to intervene in the juvenile proceedings for purposes of gaining access to the arraignments and other subsequent proceedings, as well as any judicial documents filed in connection with those proceedings. After an access hearing on the record, the Court allowed the Globe's motion to intervene for the limited purpose of seeking access, but denied the request for public access to the arraignments pursuant to 18 U.S.C. § 5038(e). However, in light of the important First Amendment issues as recently articulated in *United States* v. *A.D. PG Publishing Co.*, 28 F.3d 1353, 1994 WL 322550 at 3 (3rd Cir. 1994), the court agreed to take the matter under advisement. The three juveniles and the government oppose the Globe's motion for access, claiming that 18 U.S.C. §§ 5032 & 5038 require this court to close all hearings and to impound all records filed or created in connection with the delinquency proceedings and alternatively if the court has discretion, it should so exercise it. After consideration of the parties' briefs, the Globe's motion to open the delinquency proceedings is DENIED. However, the Globe's motion for access to certain documents is ALLOWED, limited by the conditions enumerated in the attached order, designed to ensure that the identity of the juveniles not be revealed.

BACKGROUND

The following facts are necessary for the court to discuss the legal principles implicated by the Globe's motion for access. On July 20, 1994, Federal and state officials held a press conference to announce an investigation culminating in the arrests of Mr. Clayton and the three juveniles. The next day the local press gave the arrests considerable coverage: the Boston Herald ran the story on its front and several pages. Newspaper articles discussing the crimes have detailed some of the acts of the New Dawn Hammerskins, particularly those of the adult. Several juveniles were interviewed, including one

who purported to reveal the identity of the other juveniles arrested. At least three newspapers have published names alleged to be the juveniles who are the subject of the information filed in the instant case. At least one paper printed a photograph of a juvenile, again claiming that he was one of those charged by the government. From the articles it can be reasonably inferred that the so-called "hate" crimes alleged are of significant interest to the communities in which they occurred and the public at large. It also appears other juveniles who have not been charged may be involved in the New Dawn Hammerskins.

Under the Act a juvenile is a person under eighteen years of age. 18 U.S.C. § 5031. Although one of the juveniles is now 18, the other two are 16, and the proeeedings against them should conclude prior to their eighteenth birthdays. The government asserts, however, that all three would benefit from treatment under the Act, and consequently has not sought transfer hearings to try the juveniles as adults under § 5031.

DISCUSSION

The Globe does not claim that the Act's confidentiality provisions, §§ 5032 and 5038, are facially invalid. Rather, the Globe asserts that this court has discretion to decide the extent to which the public will have access to the proceedings and the records. In support of this position, the Globe argues that: 1) the Act itself permits the court to weigh the need for and degree of closure on the specific facts of this case; and 2) the First Amendment and the common law compel the court to balance the government's reasons for closure with the public's right to an open forum, permitting narrowly tailored closure only to the extent that it serves a compelling government interest. Since it does not seek access to the names or personal identifying information of the juveniles, the Globe argues that any further restriction of the public's access to remaining

proceedings is inappropriate in light of both the Act and the United States Constitution.

1. *The Statute*

The starting point is the language of the Act itself. Section 5032 provides that a court exercising jurisdiction over a juvenile proceeding "may be convened at any time and place within the district, in chambers or otherwise." Section 5038 further provides:

> (a) Throughout and upon the completion of the juvenile delinquency proceeding, the records shall be safeguarded from disclosure to unauthorized persons. The records shall be released to the extent necessary to meet the following circumstances:
>
> (1) inquiries from another court of law;
>
> (2) inquiries from an agency preparing a report for another court;
>
> (3) inquiries from law enforcement agencies where the request for information is related to the investigation of a crime or a position with that agency;
>
> (4) inquiries, in writing, from the director of a treatment agency or the director of a facility to which the juvenile has been committed by the court;
>
> (5) inquiries from an agency considering the person for a position immediately and directly affecting the national security; and
>
> (6) inquiries from any victim of such juvenile delinquency, or if the victim is deceased from the immediate family of such victim, related to the final disposition of such juvenile by the court in accordance with section 5037.
>
> Unless otherwise authorized by this section, information about the juvenile record may not be released when the request for information is related to an application for employment, license, bonding, or any civil right or privilege. Responses to such

> inquiries shall not be different from responses made about persons who have never been involved in a delinquency proceeding. . . .
>
> (c) During the course of any juvenile delinquency proceeding, all information and records relating to the proceeding, which are obtained or prepared in the discharge of an official duty by an employee of the court or an employee of any other governmental agency, shall not be disclosed directly or indirectly to anyone other than the judge, counsel for the juvenile and the Government, or others entitled under this section to receive juvenile records. . . .
>
> (e) Unless a juvenile who is taken into custody is prosecuted as an adult neither the name nor picture of any juvenile shall be made public in connection with a juvenile delinquency proceeding.

2. *First Amendment*

As the statute implicates First Amendment concerns, this court must construe it against the backdrop of the Supreme Court's First Amendment jurisprudence governing access to judicial proceedings. The Supreme Court has held that the First Amendment's guarantees of freedom of speech, press, and assembly provide for the public's right of access to *criminal* proceedings. *See Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 575-78 (1980) *("Richmond Newspapers")*; see also *Anderson* v. *Cryovac, Inc.*, 805 F.2d 1, 10 (1st Cir. 1986) *("Anderson")*. Although "[s]everal courts have recognized a public right of access to civil as well as criminal trials," the First Circuit has not decided whether the First Amendment mandates a general right of access to civil proceedings, *Id.* at 11. Neither the Supreme Court nor the First Circuit has decided whether blanket closure of juvenile delinquency proceedings contravenes the First Amendment. *See United States* v. *A.D. PG Publishing Co.*, 28 F.3d 1353, 1994 WL 322550, at *3 (3rd Cir. 1994) *("PG Publishing")*.

In concluding that the First Amendment provides for a presumption of public access to criminal trials, the *Richmond*

Newspapers Court reasoned that public participation plays a key role in maintaining the integrity of the judicial process. *See Anderson*, 805 F.2d at 10. "The Court has said that open criminal trials ensured fairness and checked perjury, misconduct, judicial bias, and partiality." *Id.* (citing *Richmond Newspapers*, 448 U.S. at 569). "The Supreme Court identified two factors as critical to its finding that the public has a presumptive right to attend criminal trials." *Id.* "First, the criminal trial historically has been open to the press and general public." *Globe Newspaper Co.* v. *Superior Court for the County of Norfolk*, 457 U.S. 596, 605 (1982) *("Globe")*. "Second, the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole." *Id.* at 606. Thus, in deciding whether a public right of access applies to a particular proceeding, a court must inquire "whether the proceedings in question historically have been open to the public, and whether access plays a particularly significant role in the functioning of the judicial process." *Anderson*, 805 F.2d at 12 (holding that civil discovery proceedings are fundamentally different from those to which a public right of access has attached).

Even if the first amendment right of access attaches to a particular proceeding, that right is not absolute. *See Press-Enterprise Co.* v. *Superior Court of Cal.*, 478 U.S. 1, 9 (1986) *("Press-Enterprise II")* (First Anendment right of access is a qualified right). For example, "there are some limited circumstances in which the right of the accused to a fair trial might be undermined by publicity." *Id.* (footnote omitted). A court may also, in certain circumstances, close a hearing in order to protect young victims of sex crimes from the trauma of testifying in public. *See Globe*, 457 U.S. at 607-10. In any event, "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether

the closure order was properly entered." *Press-Enterprise Co.* v. *Superior Court of Cal.*, 464 U.S. 501, 510 (1984) (*"Press-Enterprise I"); see also Globe*, 457 U.S. at 606-07 ("to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest").

In *Globe*, the Supreme Court considered whether a Massachusetts statute barring public access to criminal trials during the testimony of underage sex crime victims contravened the First Amendment. The state interests articulated in support of the statute were two: 1) protecting minor victims of certain sex crimes from trauma; and 2) encouraging those victims to testify and to testify in a truthful and credible manner. *Globe I*, 457 U.S. at 607. Although the Court concluded that "safeguarding the physical and psychological well-being of a minor" was a compelling state interest, *id.* (footnote omitted), that interest could not "justify a *mandatory* closure rule, *id.* at 608 (emphasis in original). In a telling footnote, the majority noted that its:

> holding is a narrow one: that a rule of mandatory closure repecting the testimony of minor sex victims is constitutionally infirm. In individual cases, and under appropriate circumstances, the First Amendment does not necessarily stand as a bar to the exclusion from the courtroom of the press and general public during the testimony of minor sex victims. But a mandatory rule, requiring no particularized determinations in individual cases, is unconstitutional." *Id.* at 610-11 n.27.

With these principles in mind, the court turns to its reading of the relevant portions of the Act.

3. *Closure of Juvenile Proceedings*

The Globe argues that the statute does not require closure of the hearings, but gives the court discretion. *See PG Publishing* at *7 (Section 5038(e) "provides no evidence of a congressional mandate to close all juvenile delinquency hearings

and seal all records.") The Act never expressly mandates a closed hearing for a juvenile proceeding. Rather, it states that a juvenile proceeding "may be convened at any time and place within the district, in chambers *or otherwise.*" (emphasis added). While this provision, when read in isolation, appears to give the Court discretion as to whether to close the courtroom, it must be read in conjunction with Section 5038(e), which is direct and mandatory. It says that "neither the name nor the picture of any juvenile *shall* be made public in connection with a juvenile delinquency proceeding." (emphasis added).

If the court were to permit public access to the delinquency proceedings where the juveniles appear, the result is ineluctable: the juveniles' names *will* be made public. Although this provision is contained in a section entitled "use of juvenile records," the language of the provision is more broadly worded to encompass any identification "in connection with a juvenile delinquency proceeding." Closure appears to be the only way to protect the juvenile's anonymity. The Globe's commitment not to print the names or pictures of the juveniles, while commendable, does not bind other members of the media or the public in attendance. In fact, several publications have already printed the names of the persons alleged to be the juveniles named in the information. *See Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 309, 310 (1977) (if juvenile proceeding open to public, state cannot bar press from publishing information obtained lawfully).

As the government points out, the legislative history supports the court's conclusion that the Act mandates closure of the hearing in that Congress, in conference, deleted a proposed provision in the Senate version of the 1974 proposed legislation giving the press access to the juvenile hearings. S. Rep. No. 1011, 93rd Cong., 2d Sess. 3 (1974) reported in 1974 U.S.C.C.A.N. 5283, 5321 (1974) (Section 207 of Senate Bill proposed an amendment to § 5037 which permitted press access).

This statutory construction passes constitutional muster. While the interests of the juvenile defendants here and the witneses in *Globe* are unquestionably similar, the "*Globe* is not controlling in this case." *PG Publishing*, at *4. The underlying proceeding in *Globe* was a criminal trial, but here the blanket ban on public access is to an entirely different sort of proceeding which has consistently been defined by the courts as non-criminal proceedings. *See, e.g., United States* v. *Brian N.*, 900 F.2d 218, 220 (10th Cir. 1990). ("Under [the Act], prosecution results in an adjudication of status, not a criminal conviction").

While the Globe persuasively argues that, at least in certain circumstances, "the similarity between delinquency and criminal proceedings cannot be denied," that observation cannot alter the historical fact that the public in the country has *never* enjoyed unfettered access to juvenile delinquency proceedings. *See Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 105 (1979) ("all fifty states have statutes that provide in some way for confidentiality [of juvenile proceedings]"); *id.* at 109 (REHNQUIST, J., concurring) ("It is the hallmark of our juvenile justice system in the United States that virtually from its inception . . . its proceedings have been conducted outside of the public's full gaze and the youths brought before our juvenile courts have been shielded from publicity."); *Globe*, 457 U.S. at 612 (BURGER, C.J., dissenting) ("Historically our society has gone to great lengths to protect minors *charged* with crime, particularly by prohibiting the release of names of offenders, barring the press and public from juvenile proceedings, and sealing records of those proceedings.") (emphasis in original); *In re Gault*, 387 U.S. 1, 15 (1967) (juvenile not entitled to public trial), citing *Kent* v. *United States*, 383 U.S. 541, 555 (1966) (juvenile proceedings have generally been considered 'civil' in nature and not criminal).

Here, in Massachusetts, until 1990 there had been a "long-standing requirement" that a judge sitting in a juvenile session exclude the general public from the room. *See News Group Boston, Inc.* v. *Commonwealth*, 409 Mass. 627, 628 (1991)

(holding constitutional amendment permitting public access to juvenile proceedings in cases involving charges of murder, Mass. Gen. L. ch. 119, § 65 (West 1993) ("except when a child is charged with murder in the first or second degree the court *shall exclude* the general public from the room, admitting only such persons as may have a direct interest in the case")) (emphasis added). *See generally*, Note, The Public Right of Access to Juvenile Delinquency Hearings, 81 Mich. L. Rev. 1540, 1554 n.72 (1983) ("In 1939, six states and the District of Columbia excluded the public from juvenile courts and twenty-four states permitted excluding the public from the juvenile courtroom.") (citation omitted).

One linchpin of *Richmond Newspapers* and its progeny is the "unbroken, uncontradicted history, supported by reasons as valid today as in centuries past . . . that a presumption of openness adheres in the very nature of a criminal trial under our system of justice." *Richmond Newspapers*, 448 U.S. at 573. *Compare, e.g., Anderson*, 805 F.2d at 11-12 ("discovery proceedings are fundamentally different from proceedings to which the courts have recognized a public right of access"). And while it is undeniable that the public's scrutiny of a proceeding under the Act would "enhance[] quality and safeguard[] the integrity of the factfinding process," *Globe*, 497 U.S. at 606, which was the second factor relied on by the *Richmond Newspapers* plurality in determining that a qualified First Amendment right of access applies to criminal trials, *see id.* at 606 n.14, this court must conclude that the First Amendment does not guarantee a presumption of openness and access to juvenile delinquency proceedings and the records generated by those hearings. *In re J.S.*, 140 Vt. 458, 466 (1981) (error for lower court to hold that qualified right of access governed delinquency proceedings); *cf. Florida Publishing Co.* v. *Morgan*, 253 Ga. 467, 472-73 (1984) (although there is no historically based presumption of access to delinquency proceedings, blanket closure is also not necessarily constitutional). *Compare State ex. rel Dispatch Printing Co.* v. *Solove (In re T.R.)*, 52 Ohio St. 3d 6, 16-17 (1990) ("[W]e

conclude that there is no qualified right of public access to juvenile court proceedings to determine if a child is abused, neglected, or dependent, or to determine custody of a minor child."), *cert. denied*, 498 U.S. 958 (1990) *with In re N.H.*, 63 Ohio Misc. 2d 285, 294 (Ct. Common Pleas 1992) (holding right of access does apply to delinquency proceedings).

Even were I to have the discretion under the Act to open the delinquency proceedings, and even if a qualified First Amendment right attaches to juvenile delinquency proceedings, I would not exercise that discretion in the circumstances of this case for the following reasons. First, the strongly stated Congressional purpose of the Act is to facilitate rehabilitation by protecting juveniles from the stigma of criminal conviction. *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 107-108 (1979) (REHNQUIST, J. concurring) ("Publication of the names of juvenile offenders may seriously impair the rehabilitative goals of the juvenile justice system and handicap the youth's prospects for adjustment in society and acceptance by the public."). *See United States* v. *Welch*, 15 F.3d 1202, 1207 (1st Cir. 1993) (legislative history shows that the purpose of the act was to foster the rehabilitative concept of a juvenile proceeding and minimize involvement of young offenders in the juvenile and criminal justice systems), *cert. denied*, 114 S.Ct. 1863 (1994); *In Re Sealed Case* (Juvenile transfer), 893 F.2d 363, 367 (D.C. Cir. 1990); *United States* v. *Juvenile Male*, 923 F.2d 614 (8th Cir. 1991). The government has not sought to have any of these juveniles transferred to adult status, and the court gives weight to that evaluation of the offenders' current prospects for rehabilitation. Two of the juveniles have no prior criminal records and thus may be particularly amenable to rehabilitation.

Second, there is some indication that other juveniles, who have not been charged, were involved in the activities of the group, and their right to confidentiality might be jeopardized in any open juvenile proceedings.

Third, the juveniles have opposed opening the proceedings. While one juvenile may have waived his interests in confi-

dentiality by giving the press an interview, the others have not. All three juveniles have opposed public hearings. Fourth, there is no less restrictive alternative short of closing the courtroom to protect against disclosing the identity of the juveniles. The court cannot bar the media from publishing information they legally obtain. *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979).

Finally, as pointed out below, the court has reasonable alternatives which will fully protect the interests of the victims and the public embodied in the First Amendment, for example, disclosing certain records of the proceedings. In sum, after weighing the interests of the juveniles in confidentiality, and in rehabilitation, against the interests of the public, particularly the victims, to open hearings, the court concludes that closure is necessitated by a compelling governmental interest.

4. *Court Records*

Section 5038(a) provides that the records of a proceeding "shall be safeguarded from disclosure to an unauthorized person." Paragraphs 5038(a)(1)-(a)(6) list those persons or agencies to whom disclosure is mandatory; the final paragraph of § 5038(a) denotes to whom the act bars disclosure. Once again, this statutory language creates a degree of ambiguity. As the Third Circuit observed, "[i]f Congress intended paragraphs (a)(1) through (a)(6) to constitute an exclusive list of the situations in which access would be authorized, the concluding paragraph would be superfluous; if access was to be foreclosed in all but the situations described in paragraphs (a)(1)-(a)(6), the prohibition against disclosure in connection with applications for employment, licenses, bonding, and civil rights would not have been necessary." *PG Publishing*, at 5. Thus, the Act implicitly recognizes that trial judges should retain some discretion to determine the extent to which records of a juvenile proceeding are appropriate for the public to review.

In construing the statute, the court has considered the common law right of access to judicial records. *Nixon* v.

Warner Communications, Inc., 435 U.S. 589, 597 (1978). This right of access is not absolute but requires a weighing of competing interests. *Webster Groves Sch. Dist.* v. *Pulitzer Publishing Co.*, 898 F.2d 1371, 1376 (8th Cir. 1990) (without determining whether right of access governs civil proceedings generally, court held that closure of hearing to determine whether handicapped child who brought loaded gun to school should be enjoined from attending school was warranted since child's and other witnesses' privacy interests outweighed public's right of access, whether based on the Constitution or the common law). "Disclosure of court records is discretionary with the judge in most jurisdictions." *In re Gault*, 387 U.S. 1, 24-25 (1967) ("no reason why, consistently with due process, a state cannot continue if it deems it appropriate, to provide and improve provision for confidentiality of records of ... court action relating to juveniles.").

Section 5038(c), when read in conjunction with § 5038(a), does not disturb the *court's* discretion to disclose information or records relating to the proceedings in the appropriate circumstances. Rather, Section 5038(c) is directed to court and other governmental employees. *Cf. The Oklahoma Pub. Co.* v. *United States*, 515 F.Supp. 1255, 1258 (W.D. Okl. 1981) (§ 5038(d) does not apply to the press but only to court personnel and those properly under the supervision of the court). As the Third Circuit stated it "bar[s] anyone associated with a proceeding under the Act, including the United States Attorney and the employees of any other law enforcement agency from disclosing such information to unauthorized persons." *PG Publishing* at *6. But because the language "others entitled under this section" encompasses individuals or agencies permitted "to receive records under the authority implicitly recognized in § 5038(a)," *id.*, § 5038(c) does not evidence a congressional intent to impose a blanket ban on public access to records of juvenile proceedings under the Act.

Reading § 5038 as a whole, the court concludes that it has discretion to disclose records and information about a juvenile so long as the disclosure does not contravene the express man-

date in § 5038(e) that the name and picture of the juvenile not be made public.

In determining whether to exercise my statutory discretion, I have considered the following factors. First, the alleged civil rights violations were public in nature, involving, among other things, painting swastikas on synagogues and harassing African-American people in public places. The acts were designed to attract public attention, and they have. Accordingly, the public interest in the proceedings is higher than in other juvenile proceedings where the transgressions involved more private concerns. Second, these juveniles are currently aged 16, 16 and 18. While still entitled to the statutory protections of privacy, if found delinquent, they are old enough to benefit, in a rehabilitative way, from the public opprobrium attached to these charged acts. Third, as a practical matter, investigative reporting, including an interview with one of the juveniles, has already disclosed many details of the alleged transgressions. Further, many of the details have been disclosed in a related criminal prosecution of an adult. Fourth, although the First Amendment and common law presumption of openness do not attach to juvenile hearings, nonetheless the court gives great weight to the important interests they are designed to protect.

Accordingly, in balancing the juveniles' interest in privacy and rehabilitation with the public's and victims' interest in ensuring that the civil rights of all religious and racial minorities are vindicated, the Court orders that certain records be disclosed: (1) the "information," with all names and identifying information deleted; and (2) the docket, with all names and identifying information deleted. *Cf. Webster Groves School District* v. *Pulitzer Pub. Co.*, 898 F.2d at 1377 (making public redacted docket sheet in juvenile proceeding). This is consistent with the approach taken by the Supreme Court. *See, e.g., R.A.V.* v. *City of St. Paul, Minn.*, 112 S.Ct. 2538 (1992) (disclosing initials of juvenile and facts of case without disclosing identity of perpetrator). The Court denies the request for a transcript of the arraignment on the ground that

much of that hearing concerned conditions of release and the transcript would be replete with identifying information (i.e., names of parents, places of employment, etc.). All documents and records are ordered sealed unless otherwise ordered by the Court. See Order dated July 20, 1994 (Docket 6). To the extent the press seeks access to any particular document, it shall file a motion, and serve it on all counsel to the action. This order is stayed for five days in the event any of the parties seek to exercise the right to appeal within 10 days.

ORDER

The Globe's motion for access to arraignment, pretrial and trial proceedings is DENIED. The Globe's motion for access to certain court records is allowed in part. The office of the United States Attorney shall prepare for the Clerk's Office a copy of the information with all identifying information redacted within 10 days. The Clerk shall make available a docket sheet with any identifying information deleted.

s/ PATTI B. SARIS

PATTI B. SARIS
United States District Judge

Date: September 8, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL ACTION NO.
94-10181-PBS

UNITED STATES OF AMERICA

v.

THREE JUVENILES

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF ENTRY OF JUDGMENT

MAY 1, 1995

SARIS, U.S.D.J.

On July 19, 1994, the government filed a 3-count information against SP, JF, and WR, pursuant to the Federal Juvenile Delinquency Act, 18 U.S.C. § 5031 *et seq*. Count One charges the defendants with a conspiracy from June, 1993 until May, 1994 under 18 U.S.C. § 241 to intimidate Jewish citizens in the Brockton area. Count Two charges the defendants with a conspiracy during the same time period under 18 U.S.C. § 371 to intimidate black citizens in the area, in violation of 18 U.S.C. § 245(b)(2)(B) and (F). Count Three charges SP with making false statements to the FBI, in violation of 18 U.S.C. § 1001.

The trial, which was closed to the public pursuant to 18 U.S.C. § 5038(e), was held from December 14 to December 23, 1994. After weighing the evidence and the credibility of the witnesses, on December 23, 1994, this Court found that the government had proven beyond a reasonable doubt, that the defendants were guilty as charged on Counts One and Two. The Court found defendant SP not guilty on Count III. The Court also orally issued certain special findings from the bench but granted defendants' counsel timely request to seek

additional special findings pursuant to Fed. R. Crim. P. 23(c). My special findings follow. All references to juveniles will be by initials pursuant to 18 U.S.C. § 5038.

Sentencing is scheduled for May 25, 1995. From the outset, it is worth emphasizing that this case is not about defendants' First Amendment rights to freedom of speech and association, but about their *actions* which violate the federal civil rights laws and fall outside the protection of the First Amendment. *United States* v. *J.H.H.*, 22 F.3d 821, 825 (8th Cir. 1994).

I. Findings of Fact

1. *The New Dawn Hammerskins*

The New Dawn Hammerskins (NDH) was a skinhead group which consisted primarily of young men from the Brockton area. Members of the NDH believed that the Brockton area was overrun by Blacks and Jews, and favored the adoption of abusive tactics in order to scare them into leaving. The NDH was formed in the late summer or early fall of 1993.[1] It was organized into a military-type hierarchy, with "chairmen" at the top and shock troops at the bottom.

One of the leaders of this group was an adult, Brian Clayton, age twenty, who was a self-proclaimed neo-Nazi skinhead, and who believed in acts of terrorism. He was indicted in a connected case with violations of 18 U.S.C. § 241 and 18 U.S.C. §371, entered a guilty plea, and has been sentenced. Another leader was Michael Rasnick, age twenty-five, who was an immunized cooperating witness at the trial of the juveniles. Rasnick was a self-avowed white supremacist and separatist. He believed that Jews should be shipped off to Israel and Black people to Africa. He thought of himself as an opponent of the "Zionist Occupied Government", which NDH members referred to by the acronym "ZOG". Rasnick had a troubled background. A school dropout with a juvenile

[1] The NDH was not the only white supremacist group in Brockton. Another group was the Confederate Vanguards.

record, he was diagnosed as having attention deficit disorder (A.D.D.), and was receiving counselling by order of the Brockton Court for antisocial personality disorder. Rasnick spent some of his adolescence homeless because of bitter and violent altercations with a stepfather who is Jewish.

Another leader and founder of the group was SP, then 17, and a juvenile. During the 1993 school year, SP began to brandish skinhead fashion styles — a shaved head, combat boots,[2] suspenders, and flight jackets. He sometimes wore a red Nazi armband. He told a friend, CR, that he believed too many Jews lived in Brockton and that they should be sent to Israel. He also expressed the belief that whites are better than Blacks. He called Jews "kikes" or "ZOG" and African-Americans "niggers." SP told a friend, CR, that he wanted to form a group to run Jews and Blacks out of Brockton by scaring them with such tactics as "bashing" Blacks and "tagging" or spray painting Nazi and white supremacist symbols like swastikas, Celtic crosses and iron crosses. SP was interested in becoming involved in a "race war" in which whites and non-whites would do battle to wipe out the other races. He also was interested in becoming a national socialist. SP planned to join the service in order to train for the race war. (He has since joined the Navy, and, in light of this case, been administratively separated).

In the late summer of 1993, Brian Clayton asked his young cousin, EC, now seventeen, to join the NDH. EC agreed to join and appeared at an initiation ceremony at Rasnick's house attended by SP, Clayton, and JF. The task of conducting the inquiry fell to SP. He asked EC his religion, his views on interracial dating, and his opinion on different races, and extracted a promise that he would not "rat out" any members of the NDH if arrested. After EC answered all the questions satisfactorily, Brian Clayton cut off EC's hair in the kitchen, and

[2] Even the color of the laces in the skinhead combat boots had significance. Clayton wore red laces to symbolize his commitment to Nazi-like acts of violence to accomplish racial purity. Those in favor only of white supremacy or separatism wore white.

they saluted "Heil Hitler." Based on statements made by members of the group that night, EC learned that Brian Clayton was the leader of the group, SP was in charge of "security" and Rasnick was the treasurer. Rasnick was also the person who could provide EC with weapons. EC's job was to get new recruits.

An active juvenile member of the group was co-defendant JF, who became a skinhead in approximately June, 1993. He turned fifteen years old on June 8. He dressed in the fashion which typified skinhead groups: he had a shaved head, and wore a flight jacket, army boots and suspenders called "braces." He dated a seventeen year old girl named NB for three weeks in June, 1993; she later dated Brian Clayton in September, 1993 and spent time with the NDH, overhearing the views of the members on Jews and Blacks. JF stated that he believed that different races shouldn't intermarry; that Jews were a different "race" than whites; and also used the term "Zionist Occupied Government" or ZOG to refer to a movement of Jewish people to send money to Israel. Although he had one Jewish parent, his mother, he referred to Jews as "kikes", and Blacks as "niggers, coons or spooks." He told Rasnick that Blacks should be kicked out of Brockton through beatings and bashings. He also told Rasnick he wanted to get rid of ZOG through acts of violence.

Another young recruit was SM, who was fifteen. Again, SP was the leader of the initiation ceremony which took place in SM's backyard. SM's role was limited. He went to the Westgate Mall once with the group, and went to one meeting at Brian Clayton's house.

SP and JF joined the NDH and agreed with other members to desecrate Jewish synagogues in the Brockton and nearby areas and to vandalize other personal property owned by Jewish residents. Their specific intent was to intimidate Jewish residents and drive them out of the area. Similarly, defendants agreed with other NDH members and took actions to implement a plan with the specific intent to intimidate black residents through acts of violence into leaving the

Brockton area and to interfere with their use and enjoyment of the streets and sidewalks of Brockton and the Westgate Mall, a place of exhibition and entertainment.

2. *The Karp Incident*

In the spring of 1993, before he became a member of NDH, JF had read Hitler's *Mein Kampf* and was already a believer in the Nazi world view. He had a confrontation with Ms. Judith Karp, who taught about the Holocaust as part of her high school English class. JF, who then looked like other high school students, told Karp of his admiration for Hitler, and that he was regretful that Germany had not been successful in purifying itself by getting rid of the Jews and Zionists. They disagreed, needless to say, and JF grew angry at her unwillingness to hear his views, which she called "stupid." JF was also angry because he had in the past been attacked by some black students at Brockton High School, and felt the school was insensitive to the needs of white students. He believed that Ms. Karp, whom he knew to be Jewish, was a member of ZOG.

Because Ms. Karp lived near NB, he knew where she lived, and once he became a member of NDH in the late summer, he planned to take action to intimidate her into leaving the Brockton area. At about 10 p.m., on September 10, 1993, he slashed four tires on Ms. Karp's car, which was parked in the driveway of her residence in Brockton. He also carved the initials ZOG into the paint of her car.

3. *The Assault on 2 Young Black Girls*

In September, 1993, Clayton, SP, JF, and EC met in Clayton's room. JF suggested going "bashing." Clayton kept a number of baseball bats in his room for that purpose. They piled into a vehicle,[3] and proceeded to the Westgate Mall in

[3] There is some dispute over the nature of the vehicle. In his suggested findings of fact, SP argues that the testimony of EC — which forms the main basis for the court's findings with regard to this particular incident — is wholly incredible because he refers to the vehicle as a pick-up truck rather than a van. The court does not find this discrepancy so serious as to undermine the credibility of the testimony. Regardless of whether EC

Brockton where many black residents shop. In the vehicle were the baseball bats and a stick from a tree. Clayton stapled a confederate flag onto the truck, and SP was wearing a Nazi armband. Clayton stared at black shoppers and on one occasion made a racial slur. The group, attired in their typical menacing skinhead fashion, were ejected from the mall by the manager.

When they returned to the vehicle, SP was driving, and Brian, JF and EC were in the bed of the vehicle. JF spotted two black girls, about twelve to fourteen years old, walking on E. Ashland Street in Brockton, and he grabbed the stick they had brought along. When SP drove closer, JF said: "Get out of Brockton, you fucking niggers." He then threw the stick at one of the girls, striking her in the leg. They ran away, but never reported the incident to the police. Their identities are unknown. The streets and sidewalks of Brockton are facilities provided and administered by the City of Brockton.

4. *The Desecration of Temple Beth Emunah*

On Saturday, October 9, 1993, at Rasnick's house, Clayton, JF and another juvenile, SP, gathered around the kitchen table. They viewed various pamphlets espousing skinhead and neo-Nazi views, and planned an act of vandalism against a Jewish temple in Brockton in order to memorialize the death of Ian Stewart, a skinhead rock singer. Clayton and SP in the past had expressed a desire to commemorate Kristallnacht, literally the night of broken glass, a night of rioting directed against Jewish houses, businesses and temples, orchestrated by the Nazis in 1938. Rasnick refused to go because he was caring for his young son. Clayton, SP, JF and NB got into SP's family van. At the nearby Westgate Mall, Clayton gave NB money and instructed her to purchase white spray paint. On a street close to Temple Beth Emunah, the youths exited the van, leaving NB behind — but not the spray paint, which Clayton

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was mistaken about the motor vehicle or whether SP was driving a different motor vehicle that night, I found EC wholly credible in his demeanor. Moreover, his credibility is buttressed by the fact that he was providing information which adversely affected his cousin.

concealed under his coat. On a wall of the temple they painted a swastika, and wrote "In Memory of Ian Stewart." After the act of vandalism, they ran back to the van. JF told NB: "We did a tribute to Ian" and pointed to the Temple. The next morning, members of the temple, including fifth and sixth grade students, saw the Nazi graffiti and were upset by it. N.B., upset by the incident, told her friend, who was part of the Temple Emunah youth organization, about it.

Temple Beth Emunah had been vandalized in the late summer with Nazi slogans on its walls. Although there is insufficient evidence to conclude beyond a reasonable doubt that the NDH, or any one of the defendants, was the perpetrator, the earlier incident bears on defendants' intent. The earlier incident — and its upsetting effect on the members of the synagogue — had received widespread publicity. Clearly, the NDH members intended the October attack to have an in terrorem effect on the temple congregants, to persuade them to move out of the area and to interfere with their use and enjoyment of the temple property. Indeed, the congregants hired security guards to protect the members and temple property after the first incident. Temple Beth Emunah is owned by a non-profit corporation in which its members, residents of the Brockton area, hold shares.

5. *The Desecration of Temple Young Israel — Kehillath Jacob*

In October, 1992, Rasnick persuaded WR, who was already a skinhead, to join the NDH. WR was then fifteen years old. On October 16, 1992, at night, Clayton, JF, SP and WR drove to Temple Young Israel — Kehillath Jacob in Randolph, Massachusetts. This temple is also owned by a non-profit corporation in which its members, Jewish citizens, hold shares. SP spray painted "Toten Ganz Juden", which means "all Jews must die" on the synagogue wall. JF painted a "white power" fist. Clayton wrote ZOG. WR was present in order to assist and serve as a lookout.

Two elderly brothers, who were Holocaust survivors, saw the symbols the next day and wept.

6. *The Ride to Vulcan Bar*

On October 23, 1992, Clayton, SP, JF and Rasnick met and conjured up another Saturday night escapade to fulfill the goals of the NDH. This time they sought to retaliate for the jury verdict exonerating the black defendants accused of assailing Reginald Denny, a white truck driver, during the 1992 riots in South Central Los Angeles. They resolved to "bash" blacks by kicking them with their army boots and beating them with their bats. They also intended to spray paint the victims white. JF called up WR and told him about the plan. WR agreed to the venture, and SP picked them up in the van. They proceeded to an abandoned arsenal to get bricks to add to their arsenal, and drove the van to the Vulcan Bar, which the NDH members knew was frequented by Cape Verdeans. Despite all their braggadocio, when they approached the bar, their willpower failed. Rasnick attributed the failed attack on the improvident appearance of a skunk in front of the bar. Whatever the reason, they retreated, and brought WR home. A few moments later, they were pulled over by the police, and videotaped by a television camera crew. The police found 8-10 bricks, several baseball bats, and a green military canvas bag filled with cans of spray paint. Although they made no arrests, the police confiscated the spray paint and the bricks. SP, by no means shy, exercised his first amendment rights by expressing his white separatist views to the press.

7. *November, 1993*

In November, 1993, SW, a senior at Southeastern Regional High School in Brockton, joined the group. While driving with SP in his van, he would see weapons like a wooden stick engraved with the words "nigger be good." SP, Clayton, and SW talked about vandalizing a Jewish cemetery, but abandoned the plan because investigation of the NDH was underway.

8. *Scenes from Westgate Mall*

On one occasion in November, 1993, SW, SP and Clayton went to the Westgate Mall with the specific intent to harass Black patrons from using and enjoying the mall. In a Lauriat's Bookstore in the mall, Clayton approached an African-American couple browsing through magazines near the front of the bookstore and called them "mud people," adding that people "like you don't belong here. Go back to Africa." He also said he wished he had a gun and that they would "die in a race war." The others cheered Clayton on. These remarks were uttered in a loud enough voice that the couple could hear them. The couple complained to the assistant manager: "That's why we don't come to — that's why we don't like to come to this mall." Later, in the mall's garage, SW, SP and BC saw a black and white couple entering a car, and SP and BC called them "race traitors."

The Westgate Mall located in Brockton, Massachusetts, is an enclosed mall with eighty-seven stores. The mall management is handled by a group of merchants which seeks to attract patrons through entertainment events in the mall's common space — events such as home shows, car shows, fashion displays, and Santa Claus exhibitions. There are also eight restaurants. The Lauriat's Bookstore is within the enclosed area of the mall. The patronage of the Westgate Mall is about forty to fifty percent minority.

9. *The Demise of the NDH*

In December, 1993, the group began to fall apart. While they all believed in white supremacy, Rasnick and JF became uncomfortable because they believed that the organization was being dominated by the neo-Nazi views of Clayton, who continued to advocate acts of terrorism. They were also fearful of the intensifying police investigation. The FBI became involved in November, 1993.

II. Motions to Suppress

After the start of trial on December 16, 1994, defendants SP and WR filed motions to suppress their statements as involuntary under the Fifth Amendment (See Docket 72, 74). The court denied the motions as untimely filed on the ground the Court had ordered that all such motions be filed by September 9, 1994 (Docket 9). However, because of the extra-sensitivity which must be afforded juveniles, the court took evidence concerning the voluntariness of the juveniles' statements, which bears as well on the reliability of those statements. The court makes the following fact findings concerning the investigation, findings which are relevant only to the issue of voluntariness.

1. *Interviews*

The FBI case agent was Thomas Finn, Jr., who has been with the FBI for seventeen years. He interviewed JF on November 19, 1993, at which time JF denied knowledge about Ms. Karp's car or the desecration of the temple.

On January 14, 1994, Finn went to SP's home to interview him. He spoke to S.P.'s parents, as SP was not at home, and scheduled a date to return to talk about SP's involvement in the various anti-Semitic and racist attacks. Finn returned to S.P.'s house with AUSA Theodore Merritt, and interviewed him in the kitchen in the presence of his parents. SP was then seventeen, and a senior in high school. The interview lasted about one hour and a half. His parents told him to cooperate because they feared he would be put in jail. SP admitted to having white separatist views but denied being a neo-Nazi. He also discussed the views of the co-defendants. He did not mention the NDH, and denied involvement in any temple desecrations or racial attacks. He was not read his Miranda rights, and was not arrested after the interview. Finn did not intend to arrest him when he arrived at the interview. The

interview was non-custodial. SP, who had no prior arrests, remained calm, relaxed and respectful throughout the interview. His parents had told him to cooperate. S.P.'s will was not overborne, and his statements were knowingly, freely and voluntarily made.

On Thursday, June 30, 1994, at about 10:30 a.m., Finn went to WR's house with two local police officers — Robert Thibeault, who was in uniform, and Officer Robert O'Keefe. At the time, WR was sixteen years old. When they knocked on the door, WR appeared. Finn identified himself and the officers, and WR agreed to talk to them. He had been forewarned about the FBI investigation by JF and Brian Clayton. Finn had already been informed by Rasnick that WR had participated in the defacement of Temple Young Israel. He was a suspect in the investigation, but not yet a target.

WR let Finn and O'Keefe into the kitchen. Finn advised WR that he was implicated in certain attacks on the temple. WR didn't call his parents because he didn't want them to know about the incident. Unlike the interview conducted with SP, this interview had not been set up in advance, and no adult was present. During the interview, WR took two phone calls. WR implicated JF in the Karp tire slashing, described the membership and views of the NDH, confirmed the incident at the Vulcan Bar, but denied involvement in the desecration of Temple Young Israel in Randolph. When Finn accused him of lying about the Randolph temple, WR recanted, and admitted his involvement. At that point Trooper O'Keefe gave WR his Miranda rights, and WR gave the law enforcement officers a description of the role of each of the defendants and co-defendant Clayton in the Randolph desecration. According to WR's account, he had been directed to be a lookout. Neither Finn nor O'Keefe had any intention of arresting him at that time. However, they had gone there with the intention of serving a grand jury subpoena. At the conclusion of the interview, which lasted about an hour, he

was served with a grand jury subpoena to appear on July 5, 1994.[4]

In the interim WR spoke to his parents, and went with his father to an attorney to seek advice. Because his family was experiencing some financial problems, they made a decision not to seek an attorney to appear on WR's behalf at the grand jury proceeding. WR had gone to this attorney before in conjunction with a prior criminal problem. WR had been arrested, handcuffed, read his Miranda rights, charged, and convicted as a juvenile in 1992.

On July 5, 1994, WR went with his father to the Office of the United States Attorney. In a pre-grand jury meeting which lasted about two hours, AUSA Merritt told WR that he was likely to be charged with federal criminal violations. Merritt also advised him that he might be charged with state criminal law violations. Merritt did not read him his Miranda rights. There is no evidence that WR made any inculpatory statements at that pre-grand jury stage of the interview. WR was not in custody and was not arrested. WR's father advised his son to cooperate. WR went into the grand jury room where Merritt read him his Miranda rights, to the extent required by the United States Attorneys' Manual §9-11.150.

The grand jury had begun investigating these civil rights violations on December 7, 1993, and met at least on February 1 and 10, 1994 and May 24, 1994.

2. *Legal Standards*

It is well established that juveniles are entitled to the full panoply of fifth amendment rights, including those that apply at investigatory proceedings. *See In re Gault*, 387 U.S. 1, 47-48, 87 S.Ct. 1428, 1454 (1967). Indeed, as the Court has noted, "special problems may arise with respect to waiver of the privilege [against self-incrimination] by . . . children. . . . If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken

[4] There is no evidence that the grand jury subpoena had an advice of rights form attached, but my notes are unclear on this point.

to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." *Id.*, 387 U.S. at 55, 87 S.Ct. at 1458.

If an interrogation is non-custodial, then the suspect has no right under *Miranda* to have a lawyer present. *See Minnesota* v. *Murphy*, 465 U.S. 420, 422 n.3, 104 S.Ct. 1136, 1140 n.3 (1984); *United States* v. *Lanni*, 951 F.2d 440, 442 (1st Cir. 1991) (affirming finding that home interrogation was not custodial under totality of circumstances). Nor does a juvenile have a right, under the statute or the Constitution, to have his parents present. *See U.S.* v. *M.I.M.*, 932 F.2d 1016, 1018 (1st Cir. 1991) (citing with approval the proposition that "a minor may waive the privilege against self-incrimination without parental consent.").

What the Fifth Amendment does guarantee, in a non-custodial interrogation of a suspect, is an environment free of coercion. In determining whether a confession was voluntarily given when the suspect is a juvenile, courts uniformly apply a "totality of circumstances" test. *See Fare* v. *Michael C.*, 442 U.S. 707, 725, 99 S.Ct. 2560, 2572 (1979) (listing factors of age, experience, education, background, intelligence and capacity to understand).

Even when, under the appropriate test, a confession is deemed involuntary, the substance of the confession is admissible if there is a subsequent confession without any taint of coercion. "When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession." *Oreon* v. *Elstad*, 470 U.S. 298, 310, 1105 S.Ct. 1285, 193 (1985); *see also United States* v. *Mendoza Cecelia*, 963 F.2d 1467, ____ (11th Cir. 1992) (holding that taint of coerced confession was attenuated, where subsequent confession was given), *cert. denied*, 113 S.Ct. 436 (1992).

Though the Supreme Court has explicitly held that grand jury witnesses are not constitutionally entitled to 'target' or

'potential defendant' warnings, *United States* v. *Washington*, 431 U.S. 181, 186, 97 S.Ct. 1814, 1818 (1977), the U.S. Department of Justice has continued to make warnings for targets a required policy under ordinary circumstances, *United States* v. *Pacheco Ortiz*, 889 F.2d 301, 307 (1st Cir. 1989) (sanctions appropriate only where conviction was the product of manifestly improper conduct by federal officials). The manual defines a "target" as a "person as to whom the prosecutor or the grand jury has substantial evidence linking him/her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." § 9-11.150. A "subject" of an investigation is a person whose conduct is within the scope of the grand jury's investigation. *Id.*

i. *SP's Statements*

The government has borne its burden of demonstrating the voluntariness of SP's statements under the totality of the circumstances: SP was not in custody at the time of his interrogation; he was a senior in high school; his parents were present; he had been forewarned of the interview; and he was calm and collected during the interview. In deciding that SP is assertive and self-confident, and that his will was not overborne, the court is particularly influenced by SP's demeanor on the videotape taken after his van was stopped by the police in October, 1993.

ii. *WR's Statements*

Under the totality of the circumstances, the case is much closer with respect to WR. On the one hand, WR had no constitutional entitlement to a Miranda warning at the time of the initial interrogation in his home, because the interview was noncustodial. On the other hand, WR was just sixteen years old, a sophomore in high school, and he was alone with an FBI agent and two police officers. While there is no requirement that parents be present, it is troubling that the officers appeared at a time when the parents were likely to be working. A police interrogation in their absence has the potential to be highly intimidating. Moreover, although WR was a suspect as defined in the *United States Attorneys'*

Manual, § 9-11.150, and the purpose of the visit was at least in part to subpoena him to the grand jury he was not given the advice of rights which the manual requires to be given to all grand jury witnesses by the prosecutor, not just at the grand jury proceeding but also in advance as part of the subpoena or separate accompanying letter. The delay in informing WR of his status as a grand jury suspect is troubling. However, just the previous year, WR had prior criminal experience in which he was handcuffed, placed in a cruiser and given his Miranda rights. Accordingly, because of his prior involvement in criminal proceedings, the government has met its burden of demonstrating the voluntariness of WR's statements on June 30, 1994.

Moreover, WR consulted with his attorney and his parents during the 5 days that elapsed between his initial interview and the grand jury hearing; and before the grand jury he was properly administered the Miranda rights required by *United States Attorneys' Manual*, § 9-11.50 (Oct. 1, 1990). WR does not in any way challenge the propriety of the grand jury proceedings themselves. Accordingly, even if his initial statement were tainted by failure to give WR his *Miranda* rights as a subject of a grand jury proceeding, defendant's fifth amendment rights were not violated at the grand jury hearing. His testimony was not tainted by any earlier violation. The Court sees no violation of the manual so manifestly improper as to trigger the need for sanctions, particularly as the government has proven guilt beyond a reasonable doubt on both counts without WR's own statements.

III. Conclusions of Law

1. *Status as Juveniles*

The defendants are charged with acts of juvenile delinquency pursuant to 18 U.S.C. § 5031. The statute provides:

> For the purposes of this chapter, a "juvenile" is a person who has not attained his eighteenth birthday, or for the

> purpose of proceedings and disposition under this chapter for an alleged act of juvenile deliquency, a person who has attained his twenty-first birthday, and "juvenile delinquency" is the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult.

The defendants were all juveniles at the time of the offenses.

2. *18 U.S.C. § 241*

The Court finds all three defendants are guilty beyond a reasonable doubt on Count 1 of the information.

Count One of the information charges a violation of 18 U.S.C. § 241 for conspiring to injure, oppress, threaten or intimidate Jewish inhabitants of Brockton and Randolph in the free exercise or enjoyment of a right or privilege secured by the Constitution or laws of the United States. Section 241 of Title 18, United States Code, provides in pertinent part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any inhabitant of any State . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; . . . [they shall be guilty of a crime against the United States].

Section 241 contains no overt act requirement. *See United States* v. *Skillman*, 922 F.2d 1370, 1373 n.2 (9th Cir. 1990), *cert. denied*, 112 S.Ct. 353 (1991). The government has proven beyond a reasonable doubt all four elements of § 241:

One: That two or more persons conspired together to accomplish an unlawful purpose.

Two: The purpose of the conspiracy was to injure, oppress, threaten or intimidate one or more persons.

Three: One of the intended victims was an inhabitant of a state.

Four: The conspiracy was directed at the free exercise or enjoyment by such an inhabitant of a right or privilege secured by the Constitution or laws of the United States. *See*

United States v. *McDermott*, 29 F.3d 404, 407-08 (8th Cir. 1994).

In order to establish a criminal conspiracy, the government must prove three essential elements:

One: During the time period charged in the information, two or more persons reached an agreement or came to an understanding with the specific intention of injuring, threatening, or intimidating a citizen in the exercise or enjoyment of his rights under the constitution or laws of the United States.

Two: A defendant voluntarily and intentionally joined in the agreement or understanding either at the time it was first reached or at some later time while it was still in effect; and

Three: At the time a defendant joined in the agreement or understanding, he knew the purpose of the agreement or understanding. *Id.* at 408 n. 5.

SP, JF and WR knowingly and intentionally entered into an agreement to injure, oppress, threaten and intimidate Jewish inhabitants of Brockton and Randolph in the exercise of rights secured by the Constitution or laws of the United States. They each did this by joining the NDH knowing that one purpose of this group was to run the Jews out of Brockton and Randolph, and sharing that purpose. Defendants openly discussed their hostility against the Jewish people. They agreed upon a plan to damage real and personal property owned by Jews, with the aim of frightening them into leaving the area.

Although overt acts are not required under § 241, each of the defendants engaged in overt acts which manifested their intention of intimidating Jewish residents into leaving. Defendants' use of swastikas and the equally threatening message "All Jews Must Die" on the temple wall at Temple Young Israel is the most persuasive evidence of defendants' intent to intimidate Jews into leaving the area.

The right secured by the laws of the United States, asserted by the government as the basis for Count One, is the right of Jewish persons in Brockton and Randolph to hold property

without regard to race, a right protected by 42 U.S.C. § 1982. That statute provides:

> All citizens of the United States shall have the same right, in every State and Territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

The Supreme Court has made clear that § 1982 protects against private interference with its provisions, *Jones* v. *Alfred H. Mayer*, 392 U.S. 409, 413, 88 S.Ct. 2186, 2189 (1968), and that Jewish persons are protected by the statute, *Shaare Tefila Congregation* v. *Greer*, 481 U.S. 615, 617-18, 107 S.Ct. 2019, 2021-22 (1985). The right to "hold" property under § 1982 includes the right to "use property." *United States* v. *Greer*, 939 F.2d 1076, 1091 (5th Cir. 1991), *affirmed en banc*, 968 F.2d 433 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1390 (1993).

Both temples in Brockton and Randolph are owned by non-profit organizations in which the members hold shares. A limited property interest of this sort is equally protected by § 1982. *See Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 236-37, 90 S.Ct. 400, 404 (1969) (protecting black homeowner's interest in owning membership share in private club). Moreover, Ms. Karp's use of her motor vehicle, personal property, is protected.

The United States has proven that each of the defendants had specific intent to interfere with the federal right of Jewish inhabitants to hold and use property which they purchased as a house of worship, and more generally to hold and use property in the Brockton and Randolph communities.

3. *Count Two*

The Court finds all three defendants are guilty beyond a reasonable doubt on Count Two of the Information.

Count Two of the information charges a conspiracy under 18 U.S.C. § 371 to violate 18 U.S.C. § 245.

The defendants are charged with conspiracy to violate federal law under 18 U.S.C. § 371 which provides in relevant part:

> "If two more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each [is guilty of an offense against the United States]."

In order to satisfy its burden of proof, the government must establish, beyond a reasonable doubt,

First, that the defendants entered an unlawful agreement to accomplish the unlawful purposes charged in the information.

Second, that each of the defendants knowingly became a member of the conspiracy with the intent to further the common unlawful object of the conspiracy.

Third, that one of the members of the conspiracy knowingly committed at least one of the overt acts charged in the information.

Fourth, that the overt acts were committed to further some objective of the conspiracy. *See* 1 L. Sand et al. *Modern Federal Jury Instructions,* ¶ 19.01, Instruction 19-3 (1993). Mere association with members of the conspiracy is not sufficient. *United States* v. *Cintolo,* 818 F.2d 980, 1003 (1st Cir. 1987).

The Information charges that unlawful purpose of the conspiracy was to engage in actions in violation of 18 U.S.C. § 245, which provides:

> (b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with —
>
> (2) any person because of his race, color, religion or national origin and because he is or has been —
>
> (B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;
>
> (F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which

> serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and (i) which is located within the premises of which is physically located any of the aforesaid establishments; and (ii) which holds itself out as serving patrons of such establishments.

Section 245(b)(2) requires proof of four elements:

One: The defendants must have used force or threat of force.

Two: The defendants must have injured, intimidated, interfered with or attempted to injure, intimidate or interfere with any person.

Three: The defendants must have acted because of the victims race or color and because he or she had been enjoying the benefit, service, privilege, facility or activity provided or administered by any subdivision of a State, or because he or she had been enjoying the goods, services, facilities, privileges and accommodations of a place of entertainment and exhibition which serves the public or any other establishment which serves the public and is otherwise covered.

Four: The defendants must have acted willfully. *See McDermott*, 29 F.3d at 409.

i. *The Streets of Brockton*

The government has proven that all three defendants intentionally entered into a conspiracy with the intent to accomplish the unlawful purpose of intimidating black residents from using the streets of Brockton and its places of entertainment. Section 245(b)(2)(B) prohibits racially motivated interference with a person's enjoyment of a facility administered by the state or subdivision thereof. The streets and sidewalks are facilities administered by Brockton, a subdivision of the Commonwealth of Massachusetts, within the meaning of 18 U.S.C. § 245(b)(2)(B). The defendants regularly went out into

the streets armed with bricks, bats and other weapons to hunt for black people to assault, with the goal of intimidating Blacks into leaving the Brockton area. The defendants spoke often about driving Blacks out of Brockton. Their belief that there were too many Blacks in Brockton was the motivating factor in their agreement and actions. Indeed, it was this belief that spawned the notion of "bashings." SP and JF assaulted two young black girls because of their race and because they were walking down a sidewalk.

JF has tried to cast doubt on the element of intimidation, for instance, by observing that no residents of Brockton or Randolph, black or Jewish, seem to be packing their bags. There can be no doubt about the defendants' specific intent to intimidate given their preferred techniques and slogans ("Get out of Brockton," "Foreigners Out," "Go back to Africa," etc.). As Judge Aldrich once said, in a section 245 case that arose out of the busing controversy, "The general inculcation of fear in order to further a specific objective is a familiar practice." *See United States* v. *Griffin*, 525 F.2d 710, 711 (1st Cir. 1975), *cert. denied*, 424 U.S. 945 (1976). Indeed here, two Holocaust survivors were intimidated by the Nazi symbols and slogans, and two patrons of the mall expressly told the Lauriat's store owner that they didn't frequent the mall because of skinhead threats.

Although WR had not yet joined the conspiracy at the time the girls were threatened, he did participate in the aborted raid on the Vulcan Bar, a place of entertainment. He was telephoned about the plan in advance and agreed to participate. His participation in the plan included getting bricks for the bashing. While no harm was done, his active participation is sufficient to constitute an overt act, and is more than "mere presence." "Once a conspiracy is established, as well as defendant's intent to further it, any connection between the defendant and the conspiracy, even a slight one, will be sufficient to establish knowing participation." *United States* v. *Brandon*, 17 F.3d 409, 428 (1st Cir. 1994) (citing *United States* v. *Marsh*, 747 F.2d 7, 13 (1st Cir. 1984)). WR's name

also appears prominently on a list of NDH members drawn up by Rasnick during the group's period of activity, *see* Gov't Exh. 11.

Even without his own statements to government officers, the government proved beyond a reasonable doubt his membership in the conspiracy by several witnesses at trial. *Contrast United States* v. *O'Campo*, 964 F.2d 80, 82-83 (1st Cir. 1992) (finding insufficient evidence that conspirator's apartment-mate participated in conspiracy, where there was no evidence that defendant attended any meetings with conspirators, and defendant's name did not come up in statements made by any of the conspirators or by the informant). Indeed, he even boasted about participation in the Karp vandalism although the other evidence in this case suggests he was not even a member of the group at the time.

It has thus been established beyond a reasonable doubt that defendants are guilty as charged in Count II under subsection (b)(2)(B) of 18 U.S.C. § 245, covering state facilities.

ii. *The Mall*

The government's argument under section (b)(2)(F), focusing on the Westgate Mall incidents, is more complicated. That section generally covers any "place of exhibition or entertainment which serves the public, or any other establishment which serves the public and (i) which is located within the premises of which is physically located any of the aforesaid establishments; and (ii) which holds itself out as serving patrons of such establishments."

Whether malls are covered by the given provision is not so obvious as it is under the Americans with Disabilities Act, which explicitly lists "shopping center." 42 U.S.C. § 12, 181(7)(E). But neither is it so tortuous as under the First Amendment, which has been interpreted to protect free speech in malls only when the private owners' suppression of such speech would be tantamount to "state action." *See, New Jersey Coalition* v. *J.M.B.*, 650 A.2d 757, 768-770 (N.J. 1994) (surveying case law on free speech in malls under federal and state constitutions).

The government fairly constructs its argument around precedents decided in the context of Title II of the Civil Rights Act, 42 U.S.C. § 2000a(b)(4), whence section 245's list of enumerated establishments originated. Section 245 states that a public accommodation includes any establishment "which is physically located within the premises of any establishment otherwise covered by this subsection." In this context, the list of covered establishments has traditionally been construed broadly, to animate the statutory purpose of protecting civil rights. *See Welsh* v. *Boy Scouts of America*, 993 F.2d 1267, 1269 (7th Cir. 1993) (citing *Daniel* v. *Paul*, 395 U.S. 298, 308, 89 S.Ct. 1697, 1702 (1969) as mandating a broad reading of the statute), *cert. denied*, 114 S.Ct. 602 (1993).

The Westgate Mall — including its garage — is covered by subsection (b)(2)(F) for two independent reasons. First, it holds itself out as serving the patrons of all the stores it contains; and it contains eight restaurants, those being covered facilities under the plain language of the statute. *See Daniel*, 395 U.S. at 305, 89 S.Ct. at 1701 (holding that snack bar's status as a covered establishment automatically brings the entire surrounding country club facility within the ambit of Title II). Second, it sponsors entertainment events, and "any establishment which presents a performance for the amusement of a viewing public" is covered. *See Miller* v. *Amusement Enterprises, Inc.*, 394 F.2d 342, 348 (5th Cir. 1968) (en banc) (holding that amusement park was covered because, among other reasons, parents are "people watchers", and go to the park to watch their kids "perform" in kiddie rides and ice skating rinks).

Similarly, because the mall is a covered facility by virtue of its presentation of performances, Lauriat's Bookstore is covered because it holds itself out as serving the patrons of the mall, and is located within the premises of the mall.

The government has proven that all three defendants planned to intimidate black patrons from using the mall's facilities and took actions to accomplish that goal. While only SP directly participated in the threatening conduct at

Lauriat's, Brian Clayton's violent threat to the black couple was an act conducted during and in furtherance of the conspiracy and was intended to intimidate African-Americans from using the mall. Because all three were members at the time of the incident, and it was reasonably foreseeable to both JF and WR, this overt act is attributable to them.

ORDER

For the foregoing reasons, the Court finds the juvenile defendants SP, JF and WR guilty beyond a reasonable doubt as charged in Counts I and II of the information.

s/ PATTI B. SARIS

PATTI B. SARIS
United States District Judge

FEDERAL JUVENILE DELINQUENCY ACT
18 U.S.C.

§ 5031. Definitions

For the purposes of this chapter, a "juvenile" is a person who has not attained his eighteenth birthday, or for the purpose of proceedings and disposition under this chapter for an alleged act of juvenile delinquency, a person who has not attained his twenty-first birthday, and "juvenile delinquency" is the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult.

§ 5032. Delinquency proceedings in district courts; transfer for criminal prosecution

A juvenile alleged to have committed an act of juvenile delinquency, other than a violation of law committed within the special maritime and territorial jurisdiction of the United States for which the maximum authorized term of imprisonment does not exceed six months, shall not be proceeded against in any court of the United States unless the Attorney General, after investigation, certifies to the appropriate district court of the United States that (1) the juvenile court or other appropriate court of a State does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency, (2) the State does not have available programs and services adequate for the needs of juveniles, or (3) the offense charged is a crime of violence that is a felony or an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), or section 1002(a), 1003, 1005, 1009, or 1010(b)(1), (2), or (3) of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 953, 955, 959, 960(b)(1), (2), (3)), or section 922(p) of this title, and that there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction.

If the Attorney General does not so certify, such juvenile shall be surrendered to the appropriate legal authorities of such State. For purposes of this section, the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

If an alleged juvenile delinquent is not surrendered to the authorities of a State pursuant to this section, any proceedings against him shall be in an appropriate district court of the United States. For such purposes, the court may be convened at any time and place within the district, in chambers or otherwise. The Attorney General shall proceed by information, and no criminal prosecution shall be instituted for the alleged act of juvenile delinquency except as provided below.

A juvenile who is alleged to have committed an act of juvenile delinquency and who is not surrendered to State authorities shall be proceeded against under this chapter unless he has requested in writing upon advice of counsel to be proceeded against as an adult, except that, with respect to a juvenile fifteen years and older alleged to have committed an act after his fifteenth birthday which if committed by an adult would be a felony that is a crime of violence or an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), or section 1002(a), 1005, or 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, 959), criminal prosecution on the basis of the alleged act may be begun by motion to transfer of the Attorney General in the appropriate district court of the United States, if such court finds, after hearing, such transfer would be in the interest of justice; however, a juvenile who is alleged to have committed an act after his sixteenth birthday which if committed by an adult would be a felony offense that has as an element thereof, the use, attempted use, or threatened use of physical force against the person of another, or that, by its very nature, involves a substantial risk that physical force against the person of another may be used in committing the offense, or would be an offense described in

section 32, 81, 844(d), (e), (f), (h), (i) or 2275 of this title, subsection (b)(1), (A), (B), or (C), (d), or (e) of section 401 of the Controlled Substances Act, or section 1002(a), 1003, 1009, or 1010(b)(1), (2), (3) of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 953, 959, 960(b)(1), (2), (3)), and who has previously been found guilty of an act which if committed by an adult would have been one of the offenses set forth in this paragraph or an offense in violation of a State felony statute that would have been such an offense if a circumstance giving rise to Federal jurisdiction had existed, shall be transferred to the appropriate district court of the United States for criminal prosecution.

Evidence of the following factors shall be considered, and findings with regard to each factor shall be made in the record, in assessing whether a transfer would be in the interest of justice: the age and social background of the juvenile; the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; the availability of programs designed to treat the juvenile's behavioral problems.

Reasonable notice of the transfer hearing shall be given to the juvenile, his parents, guardian, or custodian and to his counsel. The juvenile shall be assisted by counsel during the transfer hearing, and at every other critical stage of the proceedings.

Once a juvenile has entered a plea of guilty or the proceeding has reached the stage that evidence has begun to be taken with respect to a crime or an alleged act of juvenile delinquency subsequent criminal prosecution or juvenile proceedings based upon such alleged act of delinquency shall be barred.

Statements made by a juvenile prior to or during a transfer hearing under this section shall not be admissible at subsequent criminal prosecutions.

Whenever a juvenile transferred to district court under this section is not convicted of the crime upon which the transfer was based or another crime which would have warranted transfer had the juvenile been initially charged with that crime, further proceedings concerning the juvenile shall be conducted pursuant to the provisions of this chapter.

Any proceedings against a juvenile under this chapter or as an adult shall not be commenced until any prior juvenile court records of such juvenile have been received by the court, or the clerk of the juvenile court has certified in writing that the juvenile has no prior record, or that the juvenile's record is unavailable and why it is unavailable.

Whenever a juvenile is adjudged delinquent pursuant to the provisions of this chapter, the specific acts which the juvenile has been found to have committed shall be described as part of the official record of the proceedings and part of the juvenile's official record.

§ 5033. Custody prior to appearance before magistrate

Whenever a juvenile is taken into custody for an alleged act of juvenile delinquency, the arresting officer shall immediately advise such juvenile of his legal rights, in language comprehensive to a juvenile, and shall immediately notify the Attorney General and the juvenile's parents, guardian, or custodian of such custody. The arresting officer shall also notify the parents, guardian, or custodian of the rights of the juvenile and of the nature of the alleged offense.

The juvenile shall be taken before a magistrate forthwith. In no event shall the juvenile be detained for longer than a reasonable period of time before being brought before a magistrate.

§ 5034. Duties of magistrate

The magistrate shall insure that the juvenile is represented by counsel before proceeding with critical stages of the proceedings. Counsel shall be assigned to represent a juvenile

when the juvenile and his parents, guardian, or custodian are financially unable to obtain adequate representation. In cases where the juvenile and his parents, guardian, or custodian are financially able to obtain adequate representation but have not retained counsel, the magistrate may assign counsel and order the payment of reasonable attorney's fees or may direct the juvenile, his parents, guardian, or custodian to retain private counsel within a specified period of time.

The magistrate may appoint a guardian ad litem if a parent or guardian of the juvenile is not present, or if the magistrate has reason to believe that the parents or guardian will not cooperate with the juvenile in preparing for trial, or that the interests of the parents or guardian and those of the juvenile are adverse.

If the juvenile has not been discharged before his initial appearance before the magistrate, the magistrate shall release the juvenile to his parents, guardian, custodian, or other responsible party (including, but not limited to, the director of a shelter-care facility) upon their promise to bring such juvenile before the appropriate court when requested by such court unless the magistrate determines, after hearing, at which the juvenile is represented by counsel, that the detention of such juvenile is required to secure his timely appearance before the appropriate court or to insure his safety or that of others.

§ 5035. Detention prior to disposition

A juvenile alleged to be delinquent may be detained only in a juvenile facility or such other suitable place as the Attorney General may designate. Whenever possible, detention shall be in a foster home or community based facility located in or near his home community. The Attorney General shall not cause any juvenile alleged to be delinquent to be detained or confined in any institution in which the juvenile has regular contact with adult persons convicted of a crime or awaiting trial on criminal charges. Insofar as possible,

alleged delinquents shall be kept separate from adjudicated delinquents. Every juvenile in custody shall be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, education, and medical care, including necessary psychiatric, psychological, or other care and treatment.

§ 5036. Speedy trial

If an alleged delinquent who is in detention pending trial is not brought to trial within thirty days from the date upon which such detention was begun, the information shall be dismissed on motion of the alleged delinquent or at the direction of the court, unless the Attorney General shows that additional delay was caused by the juvenile or his counsel, or consented to by the juvenile and his counsel, or would be in the interest of justice in the particular case. Delays attributable solely to court calendar congestion may not be considered in the interest of justice. Except in extraordinary circumstances, an information dismissed under this section may not be reinstituted.

§ 5037. Dispositional hearing

(a) If the court finds a juvenile to be a juvenile delinquent, the court shall hold a disposition hearing concerning the appropriate disposition no later than twenty court days after the juvenile delinquency hearing unless the court has ordered further study pursuant to subsection (d). After the disposition hearing, and after considering any pertinent policy statements promulgated by the Sentencing Commission pursuant to 28 U.S.C. 994, the court may suspend the findings of juvenile delinquency, enter an order of restitution pursuant to section 3556, place him on probation, or commit him to official detention. With respect to release or detention pending an appeal or a petition for a writ of certiorari after disposition, the court shall proceed pursuant to the provisions of chapter 207.

(b) The term for which probation may be ordered for a juvenile found to be a juvenile delinquent may not extend —

(1) in the case of a juvenile who is less than eighteen years old, beyond the lesser of —

(A) the date when the juvenile becomes twenty-one years old; or

(B) the maximum term that would be authorized by section 3561(b) if the juvenile had been tried and convicted as an adult; or

(2) in the case of a juvenile who is between eighteen and twenty-one years old, beyond the lesser of —

(A) three years; or

(B) the maximum term that would be authorized by section 3561(b) if the juvenile had been tried and convicted as an adult.

The provisions dealing with probation set forth in sections 3563, 3564, and 3565 are applicable to an order placing a juvenile on probation.

(c) The term for which official detention may be ordered for a juvenile found to be a juvenile delinquent may not extend —

(1) on the case of a juvenile who is less than eighteen years old, beyond the lesser of —

(A) the date when the juvenile becomes twenty-one years old; or

(B) the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult; or

(2) in the case of a juvenile who is between eighteen and twenty-one years old —

(A) who if convicted as an adult would be convicted of a Class A, B, or C felony, beyond five years; or

(B) in any other case beyond the lesser of —

(i) three years; or

(ii) the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult.

Section 3624 is applicable to an order placing a juvenile under detention.

(d) If the court desires more detailed information concerning an alleged or adjudicated delinquent, it may commit him, after notice and hearing at which the juvenile is represented by counsel, to the custody of the Attorney General for observation and study by an appropriate agency. Such observation and study shall be conducted on an outpatient basis, unless the court determines that inpatient observation and study are necessary to obtain the desired information. In the case of an alleged juvenile delinquent, inpatient study may be ordered only with the consent of the juvenile and his attorney. The agency shall make a complete study of the alleged or adjudicated delinquent to ascertain his personal traits, his capabilities, his background, any previous delinquency or criminal experience, any mental or physical defect, and any other relevant factors. The Attorney General shall submit to the court and the attorneys for the juvenile and the Government the results of the study within thirty days after the commitment of the juvenile, unless the court grants additional time.

§ 5038. Use of juvenile records

(a) Throughout and upon the completion of the juvenile delinquency proceeding, the records shall be safeguarded from disclosure to unauthorized persons. The records shall be released to the extent necessary to meet the following circumstances:

(1) inquiries received from another court of law;

(2) inquiries from an agency preparing a presentence report for another court;

(3) inquiries from law enforcement agencies where the request for information is related to the investigation

of a crime or a position within that agency;

(4) inquiries, in writing, from the director of a treatment agency or the director of a facility to which the juvenile has been committed by the court;

(5) inquiries from an agency considering the person for a position immediately and directly affecting the national security; and

(6) inquiries from any victim of such juvenile delinquency, or if the victim is deceased from the immediate family of such victim, related to the final disposition of such juvenile by the court in accordance with section 5037.

Unless otherwise authorized by this section, information about the juvenile record may not be released when the request for information is related to an application for employment, license, bonding, or any civil right or privilege. Responses to such inquiries shall not be different from responses made about persons who have never been involved in a delinquency proceeding.

(b) District courts exercising jurisdiction over any juvenile shall inform the juvenile, and his parent or guardian, in writing in clear and nontechnical language, of rights relating to his juvenile record.

(c) During the course of any juvenile delinquency proceeding, all information and records relating to the proceeding, which are obtained or prepared in the discharge of an official duty by an employee of the court or an employee of any other governmental agency, shall not be disclosed directly or indirectly to anyone other than the judge, counsel for the juvenile and the Government, or others entitled under this section to receive juvenile records.

(d) Whenever a juvenile is found guilty of committing an act which if committed by an adult would be a felony that is a crime of violence or an offense described in section 841, 952(a), 955, or 959 of title 21, such juvenile shall be fingerprinted and photographed. Except a juvenile described in subsection (f), fingerprints and photographs of a juvenile who

is not prosecuted as an adult shall be made available only in accordance with the provisions of subsection (a) of this section. Fingerprints and photographs of a juvenile who is prosecuted as an adult shall be made available in the manner applicable to adult defendants.

(e) Unless a juvenile who is taken into custudy is prosecuted as an adult neither the name nor picture of any juvenile shall be made public in connection with a juvenile delinquency proceeding.

(f) Whenever a juvenile has on two separate occasions been found guilty of committing an act which is committed by an adult would be a felony crime of violence or an offense described in section 841, 952(a), 955, or 959 of title 21, the court shall transmit to the Federal Bureau of Investigation, Identification Division, the information concerning the adjudications, including name, date of adjudication, court, offenses, and sentence, along with the notation that the matters were juvenile adjudications.

§ 5039. Commitment

No juvenile committed to the custody of the Attorney General may be placed or retained in an adult jail or correctional institution in which he has regular contact with adults incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges.

Every juvenile who has been committed shall be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, counseling, education, training, and medical care including necessary psychiatric, psychological, or other care and treatment.

Whenever possible, the Attorney General shall commit a juvenile to a foster home or community-based facility located in or near his home community.

§ 5040. Support

The Attorney General may contract with any public or private agency or individual and such community-based facilities as halfway houses and foster homes for the observation and study and the custody and care of juveniles in his custody. For these purposes, the Attorney General may promulgate such regulations as are necessary and may use the appropriation for "support of United States prisoners" or such other appropriations as he may designate.

§ 5041. Parole

A juvenile delinquent who has been committed may be released on parole at any time under such conditions and regulations as the United States Parole Commission deems proper in accordance with the provisions in section 4206 of this title.

§ 5042. Revocation of parole or probation

Any juvenile parolee or probationer shall be accorded notice and a hearing with counsel before his parole or probation can be revoked.

Supreme Court, U.S.
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No. 95-815

In the Supreme Court of the United States

OCTOBER TERM, 1995

GLOBE NEWSPAPER COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the lower courts correctly held that the public interest in rehabilitating three juveniles accused of delinquency under the Federal Juvenile Delinquency Act, 18 U.S.C. 5031-5042, justified closure of the juvenile proceeding below.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 61 F.3d 86. The opinion of the district court from which petitioner appealed (Pet. App. A20-A34) is reported at 862 F. Supp. 651. The district court's order entering judgment (Pet. App. A35-A58) is reported at 886 F. Supp. 934.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1995. A petition for rehearing was denied on August 25, 1995. Pet. App. A18. The petition for a writ of certiorari was filed on November 24, 1995 (a Monday). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. On July 19, 1994, the United States filed an information charging three juveniles under the Federal Juvenile Delinquency Act (FJDA or Act), 18 U.S.C. 5031 *et seq.* The information alleged that the juveniles conspired to interfere with the rights of others to enjoy the use of public areas, public accommodations and property, on account of their race and religion, in violation of 18 U.S.C. 241, 245, and 371. A grand jury indicted an adult for related violations of 18 U.S.C. 241 and 371 on the same date. Pet. App. A2, A20, A35.

On July 20, 1994, the district court ordered that, pursuant to the FJDA, 18 U.S.C. 5038, the public would not have access to the juveniles' arraignments or to any documents filed in connection with those arraignments. Pet. App. A21. On July 25, 1994, petitioner, a newspaper company, moved to intervene, seeking access to all proceedings and records concerning the juveniles. The juveniles and the government opposed petitioner's motions. *Ibid.*

After a hearing, the district court granted petitioner's motion to intervene for the purpose of seeking access but, pursuant to 18 U.S.C. 5032 and 18 U.S.C. 5038, it denied petitioner's request to attend the juvenile arraignments. Pet. App. A31, A33. The court first held that the FJDA mandates confidentiality in juvenile proceedings. *Id.* at A27. That result comports with the First Amendment, the court stated, because the First Amendment does not grant the public a right of access to such proceedings, which traditionally have not been open to the public. Pet. App. A23-A28. Alternatively, the court held, even if the Act gives district courts discretion to open

juvenile proceedings to the public or if there is a qualified First Amendment right of access to those proceedings, Pet. App. A25-A26, compelling governmental interests justified closure in this case. *Id.* at A30-A31. The court noted first that Congress's "strongly stated" purpose in enacting the FJDA was "to facilitate rehabilitation by protecting [juveniles] from the stigma of a criminal conviction." *Id.* at A30. The three juveniles in this case appeared particularly amenable to rehabilitation, the court noted, based on the facts that two of them had no criminal records and that the government, having considered the pertinent factors, had declined to seek the transfer of the three juveniles for prosecutions as adults. *Ibid.* The court also noted that there was no less restrictive alternative to closing the proceedings, since the juveniles' names had already been disclosed in several newspapers. *Id.* at A27, A31. The court did, however, order the release of selected redacted documents concerning the case, including the court docket and the court's final decision, finding that the public's interest in access to those documents outweighed the harm to the juveniles from their publication. *Id.* at A33.

2. The court of appeals affirmed. Pet. App. A1-A17. The court held, first, that, although the FJDA authorizes district courts to close juvenile proceedings to the public or to take lesser steps to insure confidentiality in a particular case, it does not mandate the closure of juvenile proceedings. *Id.* at A12. The court stated that its construction of the Act so as not to mandate closure avoided the need to address the issue of whether the public has a qualified First Amendment right of access to juvenile proceedings. See Pet. App. A8 (citing *DeBartolo Corp.* v. *Florida Gulf*

Coast Trades Council, 485 U.S. 568, 575 (1988)). Even in criminal proceedings involving adults, the court noted, the public's right of access is not absolute. Pet. App. A8. Rather, the Supreme Court has held that the press and public may be excluded from courtrooms "during the testimony of minor sex-offense victims," provided that a particularized determination of the need for such exclusions has been made. *Ibid.* (quoting *Globe Newspaper Co.* v. *Superior Court for the County of Norfolk*, 457 U.S. 596, 611 n.27 (1982)).

The court of appeals next held that the district court's reasons for closing the juvenile proceedings in this case were "sufficiently compelling" to justify closure under the First Amendment, even assuming *arguendo* that the "extremely stringent" First Amendment standards governing closure in adult criminal proceedings were applicable. Pet. App. A15-A16. The court noted that the district court had made "meticulously specific" findings, including that the Act seeks to protect juveniles from stigma in order to facilitate rehabilitation, that the juveniles in this case were particularly amenable to rehabilitation, that the juveniles opposed open proceedings, and that, because the media had already subjected the juveniles to "overwhelming publicity" and published their names, "adequate protection of the juveniles from stigma and public scrutiny would be impossible unless the proceedings were closed." *Id.* at A13.

The court rejected petitioner's claims that the juveniles' opposition to open proceedings was irrelevant as a matter of law to the closure determination, Pet. App. A13-A14, and that the district court had given undue weight to the fact that the juveniles had not been transferred for adult prosecution. *Id.* at A14. The court also rejected petitioner's claim that clo-

sure was inappropriate in light of the publicity that the case had received, stating that "to allow the media to 'leverage' partial information into an unfettered right of access to otherwise nonpublic proceedings would grant the media a dangerous control over important state interests." *Id.* at A15. The court did state, however, that it was "dubious" that the closure of juvenile proceedings necessitated the same level of justification under the First Amendment as the closure of adult criminal trials, Pet. App. A15, and, that under its reading of the Act, the closure of juvenile proceedings "is not an exception to some general rule of openness, but the norm." *Id.* at A13.

ARGUMENT

1. Petitioner seeks review (Pet. 6-7) to resolve "whether the public has a First Amendment right to attend juvenile delinquency trials commensurate with its right to attend criminal trials." The court of appeals, however, did not decide that question. Although the court of appeals expressed doubt that the same showing is needed under the First Amendment to justify closure of juvenile proceedings as is required to justify closure of an adult criminal trial, it ultimately found that closure in this case would be warranted even under the "extremely stringent" First Amendment standards governing closure of adult criminal trials. Pet. App. A15-A16; cf. *id.* at A8, A12 (noting that holding that the FJDA permits but does not mandate closure of juvenile proceedings enabled the court to avoid reaching a serious constitutional issue).[1]

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[1] The court of appeals' holding that the FJDA does not mandate closure of juvenile proceedings, but instead permits such closure as is consistent with the First Amendment,

2. Petitioner next argues (Pet. 24-28) that the lower courts misapplied the First Amendment test for closing adult court proceedings to the facts of this case. The courts below correctly stated that test: "reviewing courts must determine whether the closure is 'essential to preserve higher values' and 'narrowly tailored to serve that interest.'" Pet. App. A6 (quoting *Press Enterprise Co.* v. *Superior Court*, 464 U.S. 501, 510 (1984) (*Press Enterprise I*); Pet. App. A25-A26, A30-A31).

a. Petitioner argues (Pet. 25) that the court of appeals erred in giving weight in the First Amendment balance to the FJDA's "overarching objective of protecting juveniles from stigma" (Pet. App. A13), because consideration of that factor might result in closure in many cases. As the court of appeals noted (Pet. App. A4), however, in enacting the FJDA, Congress made a judgment that protecting minors accused of delinquency from public stigma serves the important public interest of furthering the juveniles' rehabilitation. See, *e.g.*, *In re Sealed Case (Juvenile Transfer)*, 893 F.2d 363, 367-368 (D.C. Cir. 1990) (citing S. Rep. No. 1011, 93d Cong., 2d Sess. 22 (1974)); *United States* v. *Welch*, 15 F.3d 1202, 1211 n.12 (1st Cir. 1993), cert. denied, 114 S. Ct. 1863 (1994); S. Rep. No. 1989, 75th Cong., 3d Sess. 1 (1938). That judgment has long been shared by many state legislatures.[2] As

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accords with the only other federal appellate decision to address that question. See *United States* v. *A.D.*, 28 F.3d 1353, 1361 (3d Cir. 1994) (*P.G. Publishing*).

[2] See *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 107 (1979) (Rehnquist, J., concurring in the judgment) ("It is a hallmark of our juvenile justice system in the United States that virtually from its inception at the end of the last century its proceedings have been conducted outside of the public's full

those States have recognized, publication of the names of accused juveniles and the details of their delinquent acts and personal histories, revealed at a public adjudication, may "seriously impair the rehabilitative goals of the juvenile justice system and handicap the youth's prospects for adjustment in society and acceptance by the public." *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 107-108 (1979) (Rehnquist, J., concurring in the judgment).

b. Petitioner also argues (Pet. 25) that the lower courts erred in considering the fact that the juveniles had requested that the proceedings be closed. Petitioner's analogy (*ibid.*) to the preference of an adult for closed proceedings in order to protect his interest in receiving a fair trial is imperfect. The preferences of a defendant are irrelevant to whether closure is necessary for a fair trial; in the case of a juvenile charged with delinquency, however, those preferences may be relevant to the rehabilitative goals of the juvenile justice system.

c. Petitioner asserts (Pet. 26) that the fact that the juveniles had not been transferred for adult prosecution was irrelevant to the issue of whether they

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gaze and the youths brought before our juvenile courts have been shielded from publicity."); *id.* at 105 (opinion of the Court) (noting that "all 50 states have statutes that provide in some way for confidentiality" of juvenile offenders); *Globe Newspaper*, 457 U.S. at 612 (Burger, C.J., dissenting) ("Historically our society has gone to great lengths to protect minors charged with crime, particularly by prohibiting the names of offenders, *barring the press and public from juvenile proceedings*, and sealing the records of those proceedings.") (emphasis added); *In re Oliver*, 333 U.S. 257, 266 n.12 (1948) ("[w]hatever may be the classification of juvenile court proceedings, they are often conducted without admitting all the public").

were amenable to rehabilitation. However, the prosecutorial decision not to seek adult prosecution is based on statutory criteria, 18 U.S.C. 5032, that are themselves relevant to the strength of the publics interest in protecting juveniles from stigma. These criteria include the age and social background of the juvenile, the nature of the alleged offense, the extent and nature of the juvenile's prior delinquency record, the juvenile's present intellectual development and psychological maturity, and the amenability of the juvenile to the rehabilitative benefits of juvenile treatment programs. 18 U.S.C. 5032; see Pet. App. A14. In deciding whether to close the juvenile proceeding, the district court was not prohibited from concluding that the government, in deeming these juveniles suitable for juvenile proceedings, determined that the juveniles were amenable to rehabilitation.

Petitioner argues that the severity of the delinquent acts of which these juveniles were accused warranted opening their adjudications. In several categories of cases, the FJDA recognizes that society's interest in punishment outweighs its interest in rehabilitating the accused juveniles, and the Act accordingly requires adult-court proceedings in those cases. Adult proceedings are required when a juvenile commits one of several specified serious crimes, is a repeat offender, and is above a certain age. 18 U.S.C. 5032. This case is not one in which adult treatment was required. The district court was therefore within its discretion to consider the merits of closure.

d. Petitioner faults the courts below for failing to consider whether the district court's findings demonstrated a "'substantial probability' that the juveniles would be harmed by publicity that closure

would prevent" (Pet. 24-25 (quoting *Press Enterprise Co.* v. *Superior Court* 478 U.S. 1, 14 (1986) *(Press Enterprise II)*). In previous courtroom-closure cases, this Court, like the courts below in this case (Pet. App. A6), has articulated the test as whether in the particular case "closure is essential to preserve higher values and is narrowly tailored to serve that interest," *Press Enterprise II*, 478 U.S. at 13-14; *Press Enterprise I*, 464 U.S. at 510, or, similarly, whether closure "is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest," *Globe*, 457 U.S. at 607. When the interest asserted has been the right of a defendant to a fair trial, the Court has held there must be "a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent" and no "reasonable alternatives to closure" that could adequately protect the defendant's right to a fair trial. *Press Enterprise II*, 478 U.S. at 14.

The courts below made clear their view that that standard was met in this case. The courts noted that "the media had already subjected the youths to overwhelming publicity," including publication of their names and identifying information (Pet. App. A13; see also *id.* at A27), and that redaction of the juveniles' names from public proceedings would be ineffective in protecting their privacy, because, "[r]ealistically, the press would merely publish detailed accounts of the 'redacted' proceedings," including every detail of the juveniles' alleged delinquency and personal histories divulged at the proceedings, "substituting the identifying information previously obtained." *Id.* at A16. The courts below concluded that "adequate protection of the juveniles from stigma and public

scrutiny would be impossible unless the proceedings were closed." *Id.* at A18; *id.* at A15, A16, A27, A31. That finding satisfies the requirement that there be a "substantial probability" of harm. See *Press Enterprise II*, 478 U.S. at 14.

e. Petitioner also asserts (Pet. 27-28) that the closure order in this case was unjustified because it "restrict[ed] access to judicial proceedings in order to protect the 'confidentiality' of information already lawfully" in the public domain. As the courts below found, however, closure of the proceedings in this case prevented the media from learning of and publicizing previously-unknown and potentially stigmatizing information about the juveniles' alleged acts and backgrounds. Pet. App. A15, A16, A27, A30-A31.[3] Furthermore, as the court of appeals observed, the media's publication of "*some* information" obtained from witness interviews and other sources does not render "any further attempts * * * to preserve confidentiality * * * futile or irrelevant" (Pet. App. A15) (emphasis added). See *In re J.D.C.*, 594 A.2d 70, 79 (D.C. Ct. App. 1991); *In re D.B.*, 439 A.2d 94, 98 (N.J. Juv. & Dom. Rel. 1981); *In re J.S.*, 438 A.2d 1125, 1130 (Vt. 1981). As the court of appeals noted (Pet. App.

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[3] It is likely that otherwise nonpublic information about a juvenile found delinquent under the FJDA will be adduced and discussed at the dispositional hearing of that juvenile. 18 U.S.C. 5037. The court may consider, for example, a juvenile's "personal traits, his capabilities, his background, any previous delinquency or criminal experience, any mental or physical defect, and any other [] factors" that may be relevant to the court's selection of a rehabilitative plan for the juvenile. 18 U.S.C. 5037. Such information will often not have been in the public domain, even when media reports have contained witness accounts of the alleged acts of delinquency.

A15), petitioner's claim is that, whenever the media have obtained (through witness interviews or other sources) and published "*some* information" about an incident, a media entity is thereafter entitled to *all* other information about the juvenile, no matter how damaging the publication of the new information might be to the juvenile's prospects for rehabilitation. The court of appeals was correct to reject that contention. Pet. App. A15; see *In re J.D.C.*, 594 A.2d at 79.

3. Petitioner finally asserts (Pet. 28) that review is warranted because the decision below conflicts with the Third Circuit's decision in *United States* v. *A.D.*, 28 F.3d 1353, 1361 (1994) *(P.G. Publishing)*, on the issue of whether there is a common law right of access to records of juvenile proceedings. The analysis of the court below (Pet. App. A16-A17), however, was consistent with that of the Third Circuit, both in recognizing "'a general right to inspect * * * judicial records and documents,'" *id.* at A16 (quoting *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 597 (1978)); *P.G. Publishing*, 28 F.3d at 1361 n.7, and in holding that that right is not absolute but is instead subject "to the sound discretion of the trial court" upon a proper showing. Pet. App. A16; *P.G. Publishing*, 28 F.3d at 1361 & n.7. Resolution of the scope of the public's right at common law to access to records of juvenile proceedings would, moreover, serve little purpose, because the issue of such access is now governed by the FJDA. There is no conflict between the decision below and the decision in *P.G. Publishing* with regard to the construction of that statute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

GLOBE NEWSPAPER COMPANY,
PETITIONER,

v.

UNITED STATES OF AMERICA, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF

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REPLY BRIEF

Petitioner Globe Newspaper Company (Globe) submits this Reply to the Brief for the United States in Opposition to Globe's Petition for a Writ of Certiorari.

ARGUMENT

1. The Court of Appeals held that the First Amendment permitted a rule of presumptive closure for juvenile proceedings. Pet. App. at A13 (closure of juvenile trials "is not an exception to some general rule of openness, but the norm."). This standard of presumptive closure belies any contention that the Court of Appeals did not decide whether the

public's right to attend juvenile trials is commensurate with its right to attend adult proceedings (which are presumptively *open* to the public) and further demonstrates that the Court of Appeals did not apply "the 'extremely stringent' First Amendment standards governing closure of adult criminal trials." Opp. at 5.

2. The Court of Appeals' decision is not in accord with that of the Third Circuit Court of Appeals in *United States* v. *A.D.*, 28 F.3d 1353 (3d Cir. 1994). The Third Circuit Court of Appeals held that the standard governing juvenile proceedings was consistent with the public's common law right of access to judicial proceedings and documents — a right of presumptive access, not presumptive closure. 28 F.3d at 1361 and n.7.

3. Neither of the courts below required or made "specific findings. . .demonstrating that, first, there is a substantial probability that" the juveniles' rehabilitative interests "will be prejudiced by publicity that closure would prevent," and, second, that "reasonable alternatives to closure cannot adequately protect" those interests. *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1, 14 (1986); Opp. at 8-10.

a. The preference of juveniles for closure in order to protect their statutory confidentiality interests is entitled to no greater weight than the preference of adult criminal defendants who seek closure to protect their constitutionally protected right to a fair trial. A mere finding that a juvenile's preference for closure is "relevant to the rehabilitative goals of the juvenile justice system" (Opp. 7) cannot satisfy the constitutional standard.

b. The record contains no evidence that the prosecutor's preference for closure was based upon the statutory criteria governing the decision of whether to try a juvenile as an adult, 18 U.S.C. 5032, nor did the District Court make any findings that the statutory criteria were

in fact satisfied (even assuming, *arguendo*, that those criteria govern the public's access rights).

c. The courts below failed to consider the extent to which the prior lawful publicity concerning the identities of the juveniles and the acts with which they were charged rendered the closure order "an exercise in futility." Pet. App. at A16. *Compare Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 110 & n.3 (1979) (Rehnquist, J.).

d. Congress' general finding that secrecy protects juveniles from stigma (Opp. 6) is no substitute for a specific finding in this case that closure is essential to prevent stigma to *these* juveniles, that it would be effective in preventing stigma despite the extensive lawful publicity concerning these juveniles and their offenses, and that closure was the only way to achieve those goals. *Cf. Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 607-609 (1982) (reliance on general legislative determination rather than case-by-case examination "cannot be viewed as a narrowly tailored means of accommodating the State's asserted interest").

4. The courts below, like the Government, failed to consider properly the intense public interest in the juvenile delinquency system. Pet. App. at A14 n.7 (finding that the heinous nature of the juveniles' conduct and the resulting public concern and outrage militated in favor of closure). Since the Petition was filed, the American Bar Association Juvenile Justice Center, in conjunction with the Youth Law Center and Juvenile Law Center, issued a report documenting pervasive problems of the juvenile justice system and the mounting public concern about the system. *See A Call for Justice, An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (American Bar Association 1995). The ABA's findings included the following:

a. "The assessment raised serious concerns that the interests of many young people in juvenile court are significantly compromised, and that many young children are literally left defenseless." *Id.* at 6-7.

b. "State studies reveal that nonwhite youths are at even greater disadvantage than their white counterparts at several, if not all stages of representation. Nonwhite youths are not only overrepresented in the system, they are also treated more harshly." *Id.* at 3.

c. "One of the most disturbing findings of the assessment is that large numbers of youth across the country appear in juvenile court without lawyers: for example, 34% of the public offender offices surveyed reported that some percentage of youth in juvenile courts in which they work 'waive' their right to counsel at the detention hearing." *Id.* at 7.

5. The ABA's report provides further support for this Court to resolve the question of whether and to what extent the First Amendment affords the public a right of access to juvenile proceedings:

> The juvenile justice system in our country is at the center of public debate. The public is concerned about juvenile crime, particularly violent crime. Congress, state legislatures, and executive agencies have insisted that the juvenile courts respond with more punitive sanctions, longer periods of confinement for many youthful offenders, and increased handling of juveniles in adult criminal courts.
>
> These measures have important consequences for youth in juvenile court who need effective representation to ensure that they are not held unnecessarily in secure detention, improperly transferred to adult criminal court, or inappropriately committed to institutional confinement. Society at large also has important interests at

> stake, including the desire for appropriate and effective sanctions for juvenile offenders and the enormous costs of increased incarceration and building new juvenile facilities at a time when state and local budgets are already severely stretched.

Id. at 4-5.

6. Whether the First Amendment protects the public's ability to inform itself about the operation of the juvenile justice system, to serve as a check against ongoing abuses within that system, and to intelligently evaluate the need for additional legislative reforms, are important, undecided questions that have divided the lower courts and which ought to be resolved by this Court.

CONCLUSION

For the foregoing reasons, and for those contained in Globe's Petition, the petition for a writ of certiorari to the United States Court of Appeals for the First Circuit should be granted.

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